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Ng Wai Pin v Ong Yew Teik and other appeals

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEALS NOS 02(i)-38–09 OF 2024(W), 02(i)-39–09 OF 2024(W), 02(i)-40–09 OF 2024(W) AND 02(i)-41–09 OF 2024(W)

ZABARIAH YUSOF, RHODZARIAH BUJANG AND HANIPAH FARIKULLAH FCJJ

25 MARCH 2025

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Civil Procedure — Striking out — Application for — Appellants' application to strike out respondent's action allowed by High Court — Court of Appeal reversed decision — Respondent sued appellants for fraud, perjury, conspiracy, malicious prosecution, and abuse of process based on allegation that appellants fabricated evidence in first suit to deprive respondent of his entitlement to proceeds from share sale — Whether common law principle of immunity of party and witness from liability in civil action, subsequent or otherwise, in respect of evidence, oral and/or written, given in judicial proceedings was absolute — Whether it was permissible for party who had been vindicated and/or was successful in first action to mount second action against same opposing party in first action based upon conduct and/or evidence of said opposing party — Whether minority views as expressed in Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another [2013] UKPC 17 and Willers v Joyce [2016] WLR 477 respectively and decision of Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301 [2018] SGCA 50 on existence of tort of malicious prosecution to civil proceedings were to be adopted in Malaysia — Whether contended cause of action premised upon tort of fraud based on perjury was recognised and/or actionable claim in Malaysia

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In 2007, Ong Yew Teik ('the plaintiff') filed a suit ('Suit 1333') in the High Court against Kamal YP Tan ('D1') for an unpaid sum of more than RM8,018,225 based on an acknowledgment of a debt for the sale of shares in a company in Thailand known as Euroceramic Technologies Company Ltd ('ECT'). The plaintiff claimed that this was in the acknowledgement of debt executed by D1 in favour of the plaintiff. D1 denied the claim and filed a counterclaim for loans which the plaintiff argued had already been compromised through the acknowledgement of debt. The plaintiff was unsuccessful in the High Court but succeeded in the Court of Appeal ('Appeal 1694') and D1's counterclaim was dismissed. There were no express findings of fraud, perjury, malicious prosecution, abuse of process or conspiracy against D1 and the defendants by the Court of Appeal. The Federal Court dismissed D1's leave to appeal and thus D1 had paid to the plaintiff the judgment sum of RM8,018,225. After Suit 1333, the plaintiff filed Suit 460 against the

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A defendants ('D1–D5') in the High Court. D1 was the defendant and D2–D5 were the witnesses in Suit 1333. D6 was D1's lawyer in Suit 1333 and was not a party to the appeal herein. The plaintiff claimed that all the defendants committed fraud and perjury in the trial of Suit 1333 at his expense, in order to cause him damage and loss in his claim in Suit 1333 by depriving him of his
B entitlement to the sale proceeds of his ECT shares to D1. He also sued D2–D6 for unlawfully conspiring when they supported the fabricated and false facts alleged by D1 in fabricating evidence and the tort of abuse of legal process. The plaintiff claimed that the defendants allegedly falsely claimed that D1 had given personal loans to the plaintiff amounting to RM3,584,211.42. The
C plaintiff specifically sued D1 for the tort of malicious prosecution and alleged that this was done to cause and/or with the knowledge that it would cause his mining ventures and business to collapse, causing him to go bankrupt. The plaintiff also alleged that in addition to the aforesaid, further preparatory acts
D that were conducted prior to the trial of Suit 1333, D6 together with D1 had conspired with D3 and D5 to dupe, coerce and manipulate the other witnesses to abet and support D1's false evidence and fabricated documents and facts. The defendants applied to strike out Suit 460 based on grounds of witness immunity, res judicata, abuse of process, failure to plead a valid cause of action
E against them, and that the plaintiff had already been fully compensated for his alleged damages in Suit 1333. The High Court allowed the striking out applications and struck out the claim against the defendants. However, the plaintiff's appeal was then allowed by the Court of Appeal. Dissatisfied, the defendants appealed and leave to appeal was allowed with the following
F questions of law: (a) whether the common law principle of immunity of a party and witness from liability in a civil action, subsequent or otherwise, in respect of evidence, oral and/or written, given in judicial proceedings was absolute ('question 1'); (b) whether it was permissible for a party who had been vindicated and/or was successful in a first action to mount a second action
G against the same opposing party in the first action based upon the conduct and/or evidence of the said opposing party ('question 2'); (c) whether the minority views as expressed in *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17 and *Willers v Joyce and another* [2016] 3 WLR 477; [2016] UKSC 43 respectively and the decision of
H *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50 on the existence of the tort of malicious prosecution to civil proceedings were to be adopted in Malaysia ('revised question 3'); and (d) whether a contended cause of action premised upon the tort of fraud based on perjury was a recognised and/or actionable claim in Malaysia ('question 4').

I **Held**, allowing the appeals:

(1) **(per Zabariah Yusof FCJ, majority)** It would defeat the whole purpose of invoking witness immunity, if a witness was to go for full trial first to determine whether immunity applied, as he would have been vexed at the

full trial in Suit 460 when defending the claim by the plaintiff. Suit 460 arose from the testimony and acts of witnesses in the course of judicial proceedings. The pleadings failed to disclose that the claim failed outside the bounds of witness immunity. Therefore, witness immunity was to be determined at the striking out application at the pleading stage, before proceeding for full trial (see paras 46–48).

(2) **(per Zabariah Yusof FCJ, majority)** The immunity afforded to witnesses of facts, was absolute and complete from any form of civil action in respect of evidence given in the course of proceedings. The statement of claim did not show any real claim of fabrication or forgery against all the defendants capable of bringing the case outside of the immunity rule and neither did it fall outside the core immunity. The allegations were general without any particulars or specifics. The plaintiff's allegations against the defendants focused solely on the evidence provided by them during the proceedings of Suit 1333, and did not fall within the exceptions to the witness immunity rule. The allegations against the defendants came within the ambit of the core immunity, namely it related to the things done or said in the course of court proceedings. As for the things said or done outside court, they were said or done in the course of proceedings which came within the extension to the core immunity. The High Court was correct in determining that D1–D5 was entitled to rely on witness immunity or privilege. Absolute immunity applied to the defendants which coverred statements made in the course of judicial proceedings, even those which were untrue and made maliciously. D1–D5 was immune from any civil action concerning the evidence provided as the witnesses during the trial of Suit 1333, especially given that the plaintiff's action in the High Court herein was to claim damages against D1–D5. Therefore, the plaintiff's claim against D1–D5 was clearly unsustainable and should be struck out. The Court of Appeal erred in law and fact by allowing the plaintiff's appeal and disregarding the application of witness immunity to D1–D5. question 1 was answered in the positive (see paras 80, 100, 104–105 & 110–113).

(3) **(per Zabariah Mohd Yusof FCJ, majority)** The second claim by the plaintiff against D1 and the other defendants was an abuse of process. The plaintiff had been vindicated or was successful in the first suit could not mount a second action against the same party in the first action based on the conduct and/or evidence of the said opposing party. Being a successful litigant in Suit 1333, the plaintiff could not be said to have been wronged. The plaintiff had been reasonably compensated by the award of interests on the judgment sum awarded to him by the Court of Appeal in Appeal 1694. As such, the plaintiff was precluded from claiming any form of damages stemming from D1's alleged refusal to pay to the plaintiff the RM8,018,225 due under the purported

acknowledgment of debt. Suit 1333 and the present appeal bore similarities in actions and damages sought. Clearly, the subject matter of the case had already been dealt with by the High Court in Suit 1333, the majority decision in the Court of Appeal in Appeal 1694 and on appeal to the Federal Court. To allow Suit 460 to go for trial was to allow relitigation on the same issues which had been decided in Suit 1333. Thus, the learned High Court judge did not err in holding that it was an abuse of court process for the plaintiff to reopen or relitigate the issues again in the present appeals. Question 2 was answered in the negative (see paras 120, 122, 126, 128 & 132–134).

(4) **(per Zabariah Mohd Yusof FCJ, majority)** So long as a person had the right in law to commence legal proceedings against another, regardless of the motive in doing so, he would not be civilly liable even if those proceedings turned out to be unmeritorious. In the context of tort law, the principle was that malice was generally irrelevant. Hence to extend the tort to civil proceedings would be inconsistent with this principle. The plaintiff had obtained a judgment in his favour in Suit 1333 and he had also received the full judgment with interest and costs. There was no mischief to be remedied. Malicious prosecution as pleaded herein ought not be a recognised cause of action in civil proceedings and therefore was rightly struck out by the High Court. The revised question 3 was answered in the positive (see paras 155 & 159–161).

(5) **(per Zabariah Mohd Yusof FCJ, majority)** On the alleged tort of fraud based on perjury, Malaysia did not recognise a general tort of fraud based on alleged perjury in Suit 1333. The alleged existence of such tort would run contrary to the principle of the doctrine of witness immunity. The appropriate remedy for perjury was within the realm of criminal law which required perjury to be proven beyond reasonable doubt. In introducing a new tort of perjury would tantamount to circumventing the rigorous threshold of burden of proof and ignoring the underlying rationale to avoid the 'chilling effect' on potential witnesses. Question 4 was answered in the negative (see paras 167–169).

(6) **(per Rhodzariah Bujang FCJ, dissenting)** The veracity of these really serious allegations against the defendants and D6 too, could not be summarily determined without a full trial where the credibility of the allegations made against these litigants and witnesses would be effectively tested through cross-examination with the audio-visual advantage enjoyed by the trial judge. The plaintiff's claim against them was against their conduct or acts and not just the false evidence itself. The plaintiff had been fully vindicated in Suit 1333 by the ultimate full satisfaction of the judgment sum he obtained in the said suit could not be, by itself, a prohibition against the filing of this action against the defendants and D6 but was a consideration in determining the quantum of damages, if the

plaintiff won in his suit against them and successfully proved that there was indeed such an engineering or fabrication of evidence and conspiracy to defraud by the defendants and D6 against him. The plaintiff's claim against the defendants and D6 based on their alleged fraudulent acts and perjury was not an obviously unsustainable one which did not merit a full trial. The application of witness immunity was a question of fact to be determined at the trial and not one which merited a striking out of a claim. Therefore, question 1, question 2 and question 4 were answered in positive (see paras 182 & 186).

(7) **(per Rhodzariah Bujang FCJ, dissenting)** The existence of the tort of malicious prosecution could be a form of deterrent against unscrupulous litigants who were motivated by malice, bad faith or unlawful extraneous consideration to file a claim against another for the wrong that was at the heart of the tort of malicious prosecution was the manipulation of the legal system. There was no appealable error in the judgment of the Court of Appeal that remitted the cases for full trial. The revised question 3 was answered in the negative and accordingly, the appeals should be dismissed with costs (see paras 189–190).

[Bahasa Malaysia summary

Pada tahun 2007, Ong Yew Teik ('plaintif') telah memfailkan saman ('Saman 1333') di Mahkamah Tinggi terhadap Kamal YP Tan ('D1') untuk jumlah yang tidak dibayar melebihi RM8,018,225 berdasarkan pengakuan hutang berkaitan jualan saham dalam sebuah syarikat di Thailand yang dikenali sebagai Euroceramic Technologies Co Ltd ('ECT'). Plaintif mendakwa bahawa ini adalah pengakuan hutang yang dilaksanakan oleh D1 memihak kepada plaintif. D1 menafikan tuntutan tersebut dan memfailkan tuntutan balas untuk pinjaman yang dikatakan telah diselesaikan melalui pengakuan hutang tersebut. Plaintif gagal dalam Mahkamah Tinggi tetapi berjaya di Mahkamah Rayuan ('Rayuan 1694') dan tuntutan balas D1 ditolak. Tiada penemuan secara nyata mengenai penipuan, sumpah bohong, pendakwaan jahat, penyalahgunaan proses atau konspirasi terhadap D1 dan defendan oleh Mahkamah Rayuan. Mahkamah Persekutuan menolak kebenaran rayuan D1 dan dengan itu D1 telah membayar jumlah penghakiman RM8,018,225 kepada plaintif. Selepas Saman 1333, plaintif mengemukakan Saman 460 terhadap defendan ('D1–D5') di Mahkamah Tinggi. D1 adalah defendan dan D2–D5 ialah saksi-saksi dalam Saman 1333. D6 ialah peguam D1 dalam Saman 1333 dan bukan pihak dalam rayuan ini. Plaintif mendakwa bahawa semua defendan telah melakukan penipuan dan sumpah bohong semasa perbicaraan Saman 1333 bagi pihaknya, untuk menyebabkan kerosakan dan kerugian terhadap tuntutannya dalam Saman 1333 dengan cara menghalangnya daripada mendapatkan hak ke atas hasil jualan saham ECT kepada D1. Dia juga menyaman D2–D6 atas tuduhan secara tidak sah bersubahat apabila mereka menyokong fakta palsu dan rekaan yang didakwa

oleh D1 dalam penghasilan keterangan palsu serta tort penyalahgunaan proses undang-undang. Plaintif mendakwa bahawa defendan-dakwa telah secara palsu mendakwa bahawa D1 telah memberikan pinjaman peribadi kepada plaintif berjumlah RM3,584,211.42. Plaintif secara khusus menuntut D1 atas tort pendakwaan jahat dan mendakwa bahawa ia dilakukan untuk menyebabkan dan/atau dengan pengetahuan bahawa ia akan menyebabkan perusahaan perlombongan dan perniagaannya runtuh, menyebabkan dia muflis. Plaintif juga mendakwa bahawa selain dari yang disebutkan di atas, tindakan persediaan lain yang dilakukan sebelum perbicaraan Saman 1333, D6 bersama D1 telah berkonspirasi dengan D3 dan D5 untuk menipu, memaksa dan memanipulasi saksi lain untuk menyokong keterangan palsu dan dokumen serta fakta rekaan D1. Defendan memohon untuk membatalkan Saman 460 berdasarkan alasan kekebalan saksi, res judicata, penyalahgunaan proses, kegagalan untuk mengemukakan kausa tindakan yang sah terhadap mereka, dan bahawa plaintif telahpun diberi ganti rugi sepenuhnya atas kerosakan yang didakwanya dalam Saman 1333. Mahkamah Tinggi membenarkan permohonan pembatalan dan membatalkan tuntutan terhadap defendan. Walau bagaimanapun, rayuan plaintif kemudian dibenarkan oleh Mahkamah Rayuan. Tidak berpuas hati, defendan merayu dan kebenaran untuk merayu dibenarkan dengan persoalan undang-undang berikut: (a) sama ada prinsip undang-undang am mengenai kekebalan sesuatu pihak dan saksi daripada liabiliti dalam tindakan sivil, selepas itu atau sebaliknya, berkenaan keterangan, sama ada lisan dan/atau bertulis, yang diberikan dalam prosiding kehakiman adalah mutlak ('soalan 1'); (b) sama ada dibenarkan bagi pihak yang telah disahkan dan/atau berjaya dalam tindakan pertama untuk memfailkan tindakan kedua terhadap pihak lawan yang sama berdasarkan tingkah laku dan/atau keterangan pihak lawan tersebut ('soalan 2'); (c) sama ada pandangan minoriti seperti yang dinyatakan dalam kes *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17 dan *Willers v Joyce and another* [2016] 3 WLR 477; [2016] UKSC 43 serta keputusan kes *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50 mengenai kewujudan tort pendakwaan jahat dalam prosiding sivil hendaklah diterima di Malaysia ('soalan 3 yang disemak semula'); dan (d) sama ada suatu kausa tindakan yang dikatakan berasaskan tort penipuan yang berteraskan sumpah bohong adalah tuntutan yang diiktiraf dan/atau boleh diambil tindakan di Malaysia ('soalan 4').

Diputuskan, membenarkan rayuan:

(1) **(oleh Zabariah Yusof HMP, majoriti)** Ia akan menghilangkan keseluruhan tujuan menguatkuasakan kekebalan saksi, jika saksi perlu menjalani perbicaraan penuh terlebih dahulu untuk menentukan sama ada kekebalan terpakai, kerana akan menjadi remeh selepas perbicaraan penuh dalam Saman 460 ketika membela tuntutan oleh plaintif. Saman 460 berpunca daripada keterangan dan tindakan saksi semasa prosiding

kehakiman. Pliding kes gagal menunjukkan bahawa tuntutan tersebut gagal di luar batasan kekebalan saksi. Oleh itu, kekebalan saksi perlu ditentukan pada permohonan pembatalan di peringkat pliding, sebelum meneruskan perbicaraan penuh (lihat perenggan 46–48).

(2) **(oleh Zabariah Yusof HMP, majoriti)** Kekebalan yang diberi kepada saksi fakta adalah mutlak dan sepenuhnya daripada sebarang bentuk tindakan sivil berkenaan keterangan yang diberikan dalam prosiding. Penyataan tuntutan tidak menunjukkan sebarang tuntutan nyata mengenai rekaan atau pemalsuan terhadap semua defendan yang mampu membawa kes ini di luar peraturan kekebalan dan juga tidak termasuk dalam pengecualian kekebalan utama. Dakwaan tersebut adalah umum tanpa butiran atau butiran khusus. Dakwaan plaintif terhadap defendan tertumpu sepenuhnya kepada keterangan yang mereka berikan semasa prosiding Saman 1333, dan tidak termasuk dalam pengecualian kepada peraturan kekebalan saksi. Dakwaan terhadap defendan berada dalam lingkungan kekebalan utama, iaitu ia berkaitan dengan perkara yang dilakukan atau dikatakan semasa prosiding mahkamah. Bagi perkara yang dikatakan atau dilakukan di luar mahkamah, ia dilakukan semasa prosiding dan termasuk dalam lanjutan kekebalan utama. Mahkamah Tinggi betul dalam memutuskan bahawa D1–D5 berhak bergantung kepada kekebalan saksi atau keistimewaan. Kekebalan mutlak terpakai kepada defendan yang meliputi kenyataan yang dibuat semasa prosiding kehakiman, walaupun kenyataan tersebut tidak benar dan dibuat dengan niat jahat. D1–D5 kebal daripada sebarang tindakan sivil berkaitan keterangan yang mereka berikan sebagai saksi semasa perbicaraan Saman 1333, terutama kerana tindakan plaintif di Mahkamah Tinggi ini adalah untuk menuntut ganti rugi terhadap D1–D5. Oleh itu, tuntutan plaintif terhadap D1–D5 jelas tidak dapat dipertahankan dan patut dibatalkan. Mahkamah Rayuan telah melakukan kesilapan dari segi undang-undang dan fakta dengan membenarkan rayuan plaintif dan mengabaikan penerapan kekebalan saksi terhadap D1–D5. Soalan 1 dijawab dengan positif (lihat perenggan 80, 100, 104–105 & 110–113).

(3) **(oleh Zabariah Yusof HMP, majoriti)** Tuntutan kedua oleh plaintif terhadap D1 dan defendan-defendan lain merupakan penyalahgunaan proses mahkamah. Plaintif telah berjaya dalam saman pertama dan tidak boleh memfailkan tindakan kedua terhadap pihak yang sama dalam tuntutan pertama berdasarkan tingkah laku dan/atau keterangan pihak lawan tersebut. Sebagai seorang litigasi yang berjaya dalam Saman 1333, plaintif tidak boleh dikatakan telah dianiaya. Plaintif telahpun diberi pampasan secara munasabah melalui penghakiman faedah ke atas jumlah penghakiman yang diberikan oleh Mahkamah Rayuan dalam Rayuan 1694. Oleh itu, plaintif tidak dibenarkan menuntut sebarang bentuk ganti rugi yang berpunca daripada penolakan D1 untuk membayar RM8,018,225 mengikut pengakuan hutang yang didakwa. Saman 1333

dan rayuan sekarang mempunyai persamaan dari segi tindakan dan ganti rugi yang dituntut. Jelas, perkara utama dalam kes ini telah pun ditangani oleh Mahkamah Tinggi dalam Saman 1333, keputusan majoriti di Mahkamah Rayuan dalam Rayuan 1694 dan di peringkat rayuan ke Mahkamah Persekutuan. Membenarkan Saman 460 untuk dibicarakan bermakna membenarkan litigasi semula terhadap isu-isu yang sama yang telah diputuskan dalam Saman 1333. Oleh itu, hakim Mahkamah Tinggi tidak melakukan kesilapan dalam memutuskan bahawa adalah penyalahgunaan proses mahkamah untuk plaintif membuka semula atau membicarakan isu-isu tersebut dalam rayuan ini. Soalan 2 dijawab dengan negatif (lihat perenggan 120, 122, 126, 128 & 132–134).

(4) **(oleh Zabariah Yusof HMP, majoriti)** Selagi seseorang mempunyai hak secara undang-undang untuk memulakan prosiding undang-undang terhadap orang lain, tanpa mengira motif di sebaliknya, dia tidak akan dikenakan liabiliti sivil walaupun prosiding tersebut ternyata tidak berasas. Dalam konteks undang-undang tort, prinsipnya adalah bahawa niat jahat secara umum tidak relevan. Oleh itu, untuk melanjutkan tort ke dalam prosiding sivil akan bercanggah dengan prinsip ini. Plaintif telah memperoleh penghakiman memihak kepadanya dalam Saman 1333 dan juga telah menerima penghakiman penuh termasuk faedah dan kos. Tidak ada sebarang khianat yang perlu diperbetulkan. Pendakwaan berniat jahat sebagaimana yang difailkan di sini tidak sepatutnya diiktiraf sebagai kausa tindakan dalam tindakan sivil dan oleh itu dibatalkan dengan betul oleh Mahkamah Tinggi. Soalan 3 yang disemak semula dijawab dengan positif (lihat perenggan 155 & 159–161).

(5) **(oleh Zabariah Yusof HMP, majoriti)** Mengenai dakwaan tort penipuan berasaskan sumpah bohong, Malaysia tidak mengiktiraf tort am penipuan berasaskan dakwaan sumpah bohong dalam Saman 1333. Kewujudan tort tersebut akan bertentangan dengan prinsip kekebalan saksi. Remedi yang sesuai untuk sumpah bohong adalah dalam bidang undang-undang jenayah yang memerlukan sumpah bohong dibuktikan melebihi keraguan munasabah. Memperkenalkan tort sumpah bohong baru adalah sama seperti mengelak daripada memenuhi piawaian beban pembuktian yang ketat dan mengabaikan rasional asas untuk mengelak 'chilling effect' terhadap saksi berpotensi. Soalan 4 dijawab dengan negatif (lihat perenggan 167–169).

(6) **(oleh Rhodzariah Bujang HMP, menentang)** Kesahihan dakwaan yang amat serius terhadap defendan dan D6 juga, tidak boleh diputuskan secara ringkas tanpa perbicaraan penuh di mana kredibiliti dakwaan terhadap litigasi dan saksi ini akan benar-benar diuji melalui soal balas dan dengan kelebihan audiovisual yang didapati oleh hakim perbicaraan. Tuntutan plaintif terhadap mereka adalah berdasarkan tindakan atau perbuatan mereka dan bukan sekadar keterangan palsu itu sendiri.

Plaintif telah pun berjaya sepenuhnya dalam Saman 1333 melalui penghakiman penuh yang diperolehnya dalam saman tersebut dan ini tidak semestinya menjadi halangan untuk memfailkan tindakan ini terhadap defendan dan D6, tetapi menjadi pertimbangan dalam menentukan jumlah ganti rugi, jika plaintif memenangi tuntutan mereka dan berjaya membuktikan bahawa terdapat rekaan keterangan dan konspirasi untuk menipu oleh defendan dan D6 terhadapnya. Tuntutan plaintif terhadap defendan dan D6 berdasarkan tindakan penipuan dan sumpah bohong mereka bukanlah satu tuntutan yang jelas tidak dapat dipertahankan sehingga tidak layak dibicarakan sepenuhnya. Penerapan kekebalan saksi adalah soal fakta yang perlu ditentukan semasa perbicaraan dan bukan satu tuntutan yang dibatalkan. Oleh itu, soalan 1, soalan 2, dan soalan 4 dijawab dengan positif (lihat perenggan 183 & 186).

(7) **(oleh Rhodzariah Bujang HMP, menentang)** Kewujudan tort pendakwaan berniat jahat boleh menjadi satu bentuk pencegahan terhadap pihak litigasi yang tidak bermoral, yang didorong oleh niat jahat, niat buruk atau pertimbangan luar menyalahi undang-undang untuk memfailkan tuntutan terhadap pihak lain kerana kesalahan yang berkaitan dengan tort pendakwaan berniat jahat adalah manipulasi sistem undang-undang. Tidak terdapat kesilapan yang boleh dirayu dalam penghakiman Mahkamah Rayuan yang meremitkan semula kes untuk perbicaraan penuh. Soalan 3 yang disemak semula dijawab dengan negatif dan oleh itu, rayuan haruslah ditolak dengan kos (lihat perenggan 189–190).]

Cases referred to

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Roy v Prior [1970] 1 QB 283, CA (refd)
Roy v Prior [1971] AC 470, HL (refd)
Silcott v Commissioner of Police for the Metropolis [1996] 8 Admin LR 637, CA (refd)
Singh v Reading Borough Council and another [2013] 1 WLR 3052, CA (distd)
Stanton and another v Callaghan and others [2000] QB 75, CA (refd)
Sum Cheung Wai v Tsui Hin Yuet [2016] 6 HKC 494, CA (refd)
Surzur Overseas Ltd v Koros and others [1999] All ER (D) 200, CA (distd)
Symphony Group Plc v Hodgson [1994] QB 179, CA (refd)
Takako Sakao v Ng Pek Yuen & Anor (No 3) [2010] 2 MLJ 141, FC (refd)
Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1, FC (refd)
Trengganu State Economic Development Corporation v Nadefinco Ltd [1982] 1 MLJ 365 (refd)
Willers v Joyce and another [2016] 3 WLR 477; [2016] UKSC 43, SC (refd)
Yanfull Investments Ltd v Datuk Ooi Kee Liang [2017] 5 HKC 42, CA (refd)

Legislation referred to

Coroners Act [CN]
Penal Code s 193
Rules of Civil Procedure [CN] r 21.01(1)(b)
Rules of Court 2012 O 18 r 19, O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(b)

Appeal from: *Ong Yew Teik v Ng Wai Pin and other appeals* [2025] 2 MLJ 454 (Court of Appeal, Putrajaya)

Elizabeth Lau (with Hazel Siau) (Elizabeth Lau) in Civil Appeal No 02(i)-38–10 of 2024(W) for the appellant.
Robert Low (with Karen Yong Hwei Woon and Khong Mei-Yan) (Robert Low & Ooi) in Civil Appeal No 02(i)-39–10 of 2024(W) for the appellant.
Nicholas Poon (Kit & Assoc) in Civil Appeal No 02(i)-40–10 of 2024(W) for the appellant.
Surendra Ananth (Surendra Ananth) in Civil Appeal No 02(i)-41–10 of 2024(W) for the appellant.
Rajan Navaratnam (with Oazair bin Huneid Tyeb) (Roshan) in Civil Appeal Nos 02(i)-38–10 of 2024(W), 02(i)-39–10 of 2024(W), 02(i)-40–10 of 2024(W) and 02(i)-41–10 of 2024(W) for the respondent.

Zabariah Yusof FCJ (delivering majority judgment of the court):

[1] The four appeals before us originated from striking out applications by the five appellants (first defendant–fifth defendants in the High Court) under O 18 r 19(1) of the Rules of Court 2012 in the High Court, which allowed the striking out applications. Appeals by the five appellants (the first defendant–fifth defendant in the High Court) to the Court of Appeal resulted in the Court of Appeal reversing the decision of the High Court and remitted the cases back to the High Court for a full trial.

[2] These four appeals relate primarily to the issues of witness immunity when testifying in court proceedings, the application of the doctrine of finality of litigation and implications of enforcement of such a doctrine which may lead to an ad infinitum/satellite litigation. The appeals raise an important and a novel point of law, namely whether the witnesses have absolute immunity from liability in a civil action, subsequent or otherwise, in respect of evidence, oral and/or written, given in judicial proceedings.

[3] Other related issues are pertaining to the applicability of the tort of malicious prosecution in civil proceedings and the applicability of the tort of fraud based on perjury is a recognised/actionable claim in Malaysia.

[4] For convenience we will refer to the parties as they were, in the High

Court. The parties in the present appeals are as follows:

(a) 02(i)-38–10 of 2024 (W) — appeal of Ng Wai Pin (D2 in the High Court). The striking out applications was pursuant to O 18 r 19(1)(a) of the Rules of Court 2012;

(b) 02(i)-39–09 of 2024 (W) — appeal of Kamal YP Tan (D1 in the High Court). The striking out applications were pursuant to O 18 r 19(1)(a), (b), (c), (d) of the Rules of Court 2012 and inherent jurisdiction of the court;

(c) 02(i)-40–10 of 2024 (W) — appeal of Wong Yoke Yen (D4 in the High Court). The striking out applications were pursuant to O 18 r 19(1)(a), (b), (c), (d) of the Rules of Court 2012; and

(d) 02(i)-41–10 of 2024 (W) — appeals of Michael Gunalan Benedict and Wong Fook Lin (D3 and D5 in the High Court). The striking out applications was pursuant to O 18 r 19(1)(a), (b), (d) of the Rules of Court 2012.

QUESTIONS OF LAW

[5] This court had allowed leave to appeal on the following common questions of law for all of the appeals, which are as follows:

(1) whether the common law principle of immunity of a party and witness from liability in a civil action, subsequent or otherwise, in respect of evidence, oral and/or written, given in judicial proceedings is absolute?

(2) whether it is permissible for a party who had been vindicated and/or was successful in a first action to mount a second action against the same opposing party in the first action based upon the conduct and/or evidence of the said opposing party?

(3) whether the tort of malicious civil prosecution is only actionable and/or confined to the specific instances set out at para 67 of the Privy Council decision of *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17? and

(4) whether a contended cause of action premised upon the tort of fraud based on perjury is a recognised and/or actionable claim in Malaysia?

[6] Subsequently during submissions, counsel for D1 applied for question 3 to be revised as follows:

> 3. Whether the minority views as expressed in *Crawford* and *Willers* respectively and the decision of *Lee Tat Development* on the existence and the availability of the tort of malicious prosecution to civil proceedings are to be adopted in Malaysia.

This revised question was objected by counsel for the plaintiff. After hearing submissions from both sides, we allowed the application for question 3 to be revised.

[7] As for the main appeal, after hearing submissions from all parties both oral and written, including perusing through the relevant cause papers, the panel came to a split decision. Zabariah Mohd Yusof FCJ and Hanipah Farikullah FCJ formed the majority judgment whilst Rhodzariah Bujang FCJ dissenting. The majority allowed the appeal with costs.

[8] We hereby state our reasons for the decision. This judgment constitutes the majority judgment of this court.

BACKGROUND FACTS

[9] These appeals relate to three suits in the High Court. They are Suit 1333, Suit 1530 and Suit 460.

Suit 1333 — Ong Yew Teik v Kamal YP Tan

[10] In 2007, Ong (the plaintiff) had filed a suit in the High Court against Kamal YP Tan (D1) for an unpaid sum of more than RM8,018,225 based on an acknowledgment of a debt for the sale of shares in a company in Thailand known as Euroceramic Technologies Co Ltd ('ECT') (this suit is referred to as Suit 1333 ('the first suit') in this judgment). The plaintiff claims that, this was in the acknowledgement of debt executed by D1 in favour of the plaintiff in the letter of pre-agreement/undertaking dated 26 October 2006. D1 denied the claim and filed a counterclaim for loans which the plaintiff argued had already been compromised through the acknowledgement of debt.

[11] In Suit 1333 (the first suit), the plaintiff was unsuccessful in the High Court but succeeded in the Court of Appeal (Appeal 1694) and D1's counterclaim was dismissed. There were no express findings of fraud, perjury, malicious prosecution, abuse of process or conspiracy against D1 and the defendants by the Court of Appeal. D1 appealed to the Federal Court wherein leave was dismissed and subsequent review application by D1 was also dismissed. The effect of the Court of Appeal decision in Appeal 1694 is that D1 has to pay the plaintiff and Roger Yue Sau Kim for the same ECT shares.

[12] Pursuant to the Court of Appeal decision, D1 has paid to the plaintiff the judgment sum of RM8,018,225 with interest at 5%pa from the date of filing to the date of realisation, and costs of RM100,000.

Suit 1530 — Roger Yue Sau Yin v Kamal YP Tan

[13] In 2010, the plaintiff's uncle, Roger Yue Sau Yin sued D1, allegedly for breaching a sale and purchase agreement of the same ECT shares as Roger claimed that the sum of RM3.8m was due to him ('Suit 1530'). This suit is separate and distinct from Suit 1333 (the first suit) although was ordered to be tried together.

[14] Suit 1530 was determined in favour of Roger Yue. D1 did not appeal against the judgment of suit 1530.

Suit 460 (the second suit) — Ong Yew Teik v Kamal YP Tan, Ng Wai Pin, Michael Gunalan Benedict, Wong Yoke Yen, Wong Fook Lim and Yee Teck Fah

[15] After Suit 1333 (the first suit), the plaintiff filed Suit 460 (the second suit) which resulted in the present four appeals before us. In Suit 460 (the second suit), the plaintiff sued six defendants (ie Ng Wai Pin, Kamal YP Tan, Wong Yoke Yen, Michael Gunalan, Wong Fook Lin, Yee Teck Fah) in tort in the High Court.

[16] D1 was the defendant and D2–D5 in Suit 460 (the second suit) were witnesses in Suit 1333 (the first suit). Yee Teck Fah (D6), was D1's lawyer in Suit 1333 (the first suit) and is not a party to the appeal herein.

[17] The plaintiff in Suit 460 (the second suit) claimed that all the defendants committed fraud and perjury in the trial of Suit 1333 (the first suit) at his expense, in order *to cause him damage and loss in his claim in Suit 1333* (the first suit) by depriving him of his entitlement to the sale proceeds of his ECT shares to D1. He also sued D2–D6 for unlawfully conspiring when they supported the fabricated and false facts alleged by D1 in fabricating evidence and the tort of abuse of legal process. D2-D6 were never parties to Suit 1333 (the first suit).

[18] The plaintiff claimed that the defendants allegedly falsely claimed that D1 had given personal loans to the plaintiff amounting to RM3,584,211.42.

[19] The plaintiff specifically sued D1 for the tort of malicious prosecution based on the same alleged acts. The plaintiff alleged that this was done to cause and/or with the knowledge that it would cause his mining ventures and business to collapse, causing him to go bankrupt. The plaintiff also alleged that in addition to the aforesaid, further preparatory acts that were conducted prior to the trial of Suit 1333 (the first suit), D6 together with D1 had conspired with D3 and D5 to dupe, coerce and manipulate the other witnesses (Kong Ah Choo, Edward Moses and Law Swee Haw, who have since recanted and have filed police reports against D1 and D6), to abet and support D1's false evidence

and fabricated documents and facts. The plaintiff claimed that all these were only discovered after the conclusion of the trial when they lodged police reports on the unlawful acts committed.

[20] Five out of the six defendants in the High Court applied to strike out Suit 460 (the second suit) against them based on grounds of witness immunity, res judicata, abuse of process, failure to plead a valid cause of action against them, and that the plaintiff had already been fully compensated for his alleged damages in Suit 1333 (the first suit).

[21] The present appeals are in relation to the striking out applications by the respective D1–D5 in Suit 460 (the second suit).

IN THE HIGH COURT

[22] The learned High Court judge allowed the four striking out applications by D1–D5 on the following grounds:

(a) res judicata:

(i) the plaintiff's claim arises solely from the defendants' evidence in the trial of Suit 1333 (the first suit). The background facts in this suit are the same as in Suit 1333 (the first suit);

(ii) the damages prayed for by the plaintiff in paras 71–75 of the statement of claim relates to the failure of D1 to pay the sum of RM8,018,225 and because D1 defended the Suit 1333 (the first suit), and filed a counterclaim;

(iii) the plaintiff submitted that he could not have included the claim for the tort of abuse of process, malicious falsehood and the alleged fraud in the Suit 1333 (the first suit) as at the time of filing of the Suit 1333 (the first suit), as there has yet to be a complete cause of action. It could only be filed after his claim was decided in his favour;

(iv) the learned High Court judge did not agree in relation to the claim for the tort of abuse of process and the related fraud/perjury. He held that the facts that the plaintiff relied on, ie the alleged fraudulent evidence, perjury, false affidavits and submissions filed by D1 with the assistance of the other defendants were all available in Suit 1333 (the first suit). The plaintiff could have filed his allegation that the evidence, documents and submissions were false in his answer to the counterclaim by D1;

(v) even though D2–D6 were not parties in Suit 1333 (the first suit), this does not mean the doctrine of res judicata does not apply;

(vi) it would be an abuse of court's process for the plaintiff to attempt to re-open the issues in this new suit as the claim against D2–D6 is all concerning the evidence presented in the earlier suit and the damages claimed relates to D1's failure to pay the principal sum expeditiously. There is clear 'substantial duplication of issues and reliefs sought in Suit 1333 (the first suit) and in Suit 460 (the second suit);

(vii) these issues could have been raised in the earlier Suit 1333 (the first suit) and it would be wrong to allow the plaintiff to have a second bite of the cherry in a clear attempt to seek additional damages based on the same facts as those raised earlier;

(viii) the alleged perjury and alleged fraudulent representation of evidence by the defendants were before the High Court and were eventually dealt with by the Court of Appeal in Suit 1333 (the first suit); and therefore, the plaintiff is barred by res judicata from pursuing the claim based on the tort of abuse of process against D1–D5;

(b) malicious prosecution:

(ix) Malaysian jurisprudence limits the application of the tort of malicious prosecution to claims that relate to either the institution of winding up or bankruptcy proceedings that were instituted mala fide. The extent and limits of the said tort remain unanswered in English law;

(x) being bound by stare decisis, the learned High Court judge struck out the claim against the defendants based on the tort of malicious prosecution;

(c) conspiracy:

(xi) this claim is based on the same factual matrix as the other claims above, but based on the pleadings, the plaintiff has sufficiently pleaded the necessary elements for the tort of conspiracy. The learned High Court did not strike out the claim premised on conspiracy claims;

(d) fraud for alleged perjury:

(xii) this is not recognised based on Malaysian common law and if it is, it will potentially lead to the opening of floodgates to

every litigant dissatisfied with the evidence presented by witnesses for opponent;

(xiii) the issue of perjury or presentation of false evidence also could have been raised in Suit 1333 (the first suit). It would be inappropriate for this court to investigate the same factual matrix and evidence presented in Suit 1333 (the first suit) to determine whether the defendants have perjured themselves;

(e) witness privilege:

(xiv) this immunity is still applicable under English law but does not exist in certain limited circumstances. This is to be distinguished from the rule of absolute immunity in other commonwealth jurisdictions, such as Australia and Canada. Malaysia still utilises the absolute immunity rule for witnesses;

(xv) there are always exceptions to the general rule. The limitation to the said witness' immunity arises where it could be shown that the said witness has a duty to the litigant such as a friendly expert or where the statements were not part of court proceedings;

(xvi) based on the current legal position under Malaysian law, the defendants are entitled to rely on the defence of witness immunity;

(xvii) however egregious the conduct of the defendants in Suit 1333 (the first suit), these issues should have been heard and disposed of, at the said suit. To enable the plaintiff to now file a new suit based on the same facts and same evidence against the witnesses is not in the best interest of the administration of justice;

(xviii) the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants. They do not owe any duties to the plaintiff and the statements or evidence presented at the Suit 1333 (the first suit) and the statements were made during legal proceedings;

(f) the plaintiff has been fully compensated in the Suit 1333 (the first suit):

(xix) the Court of Appeal in Suit 1333 (the first suit) had allowed the plaintiff the full sum claimed against D1 with interest at the rate of 5%pa from the date of filing to the date of full realisation. If the plaintiff had suffered damages as a result of the failure by D1 to repay him early, ie the loss of the mining ventures, bankruptcy and other financial losses, then he

should have raised these claims in those proceedings; and

(xx) the claim against the defendants for these damages should be struck out to ensure that the court process is not abused by the aforesaid litigant and to ensure finality to litigation.

[23] Ultimately, the High Court struck out the claim against the defendants.

IN THE COURT OF APPEAL

[24] The panel allowed the appeal by the plaintiff. The decision of the Court of Appeal was premised on the following reasons, inter alia:

(a) in this case, the court examined the plaintiff's claims, which included allegations of conspiracy, fraud, abuse of process, and malicious prosecution;

(b) the court highlighted that the principles for striking out pleadings under O 18 r 19 of the Rules of Court 2012 require that such action only be taken in clear and obvious cases. The plaintiff's claims were based on conspiracy to fabricate false evidence and to defraud the appellant during the trial of Suit 1333 (the first suit), which was not the subject of the initial proceedings. The court found that the plaintiff had not previously raised these issues in Suit 1333 (the first suit), as the fraudulent actions and fabricated evidence were only discovered after the close of pleadings in that suit. Therefore, the plaintiff's current claim was not barred by res judicata or estoppel, as it concerned a different set of facts related to the defendants' alleged misconduct, not the breach of the acknowledgment of debt from Suit 1333 (the first suit);

(c) the court also addressed the claim of malicious prosecution, which was based on the defendants' alleged abuse of the court process by submitting false evidence and intimidating witnesses to mislead the court in Suit 1333 (the first suit). The plaintiff argued that the first defendant had made a false counterclaim to injure the plaintiff, and that the defendants had conspired to support fabricated facts through false affidavits and documents. The High Court had previously ruled that a claim for malicious prosecution was only applicable to winding up and bankruptcy proceedings, a view the court disagreed with, citing the tort of abuse of process as actionable in various circumstances, not just in winding up cases;

(d) the court further disagreed with the High Court's decision to strike out the plaintiff's claim of conspiracy, noting that the facts alleged required a more thorough examination at trial;

(e) finally, the court considered the issue of witness immunity, noting that the High Court had wrongly interpreted the scope of witness immunity.

The plaintiff contended that the immunity should not apply to acts of procuring false evidence. The court found merit in the plaintiff's position, suggesting that exceptions to witness immunity, recognized in jurisdictions like the UK, could also apply in Malaysia, especially in cases of fraud and deliberate misconduct; and

(f) given the complexity of the claims and the serious legal questions raised, the court concluded that the plaintiff's case was not so plainly unsustainable as to warrant summary disposal. As a result, the court allowed the plaintiff's appeal, set aside the previous judgment, and remitted the case to the High Court for a full trial, with costs of RM60,000 awarded for each appeal.

[25] Dissatisfied with the Court of Appeal's decision above, the defendants now appeal to the Federal Court with the aforementioned questions of law.

ANALYSIS AND FINDINGS

The premise of Suit 460 (the second suit) against each of the defendants

[26] Suit 460 (the second suit) is against D1–D6 filed in 2021. The background facts relate to the same background facts as in Suit 1333 (the first suit), namely the ECT sale of shares and acknowledgement of debt claimed, which had been ventilated and adjudged, and judgment sum had been paid to the plaintiff in Suit 1333 (the first suit).

[27] The claim against D1 in Suit 460 (the second suit) is premised on perjury, fraud, forgery, conspiracy, malicious prosecution and abuse of court's process. According to the pleadings, the particulars as enumerated in the claim against D1, the allegations are all in respect of the false evidence allegedly given by D1 and the other defendants in the course of giving evidence in Suit 1333 (the first suit).

[28] Essentially, the plaintiff's claim for loss and damage against D1 is that he had suffered loss because of D1's refusal to pay the RM8,018,225 which is the judgment sum awarded in Suit 1333 (the first suit) and from D1's conduct in mounting an unmeritorious counterclaim in Suit 1333 (the first suit) and gave false evidence. For this we refer to para 71 of the statement of claim which states:

(a) inability to pay for annual fees resulting in loss of mining concessions;

(b) inability to pay for operating expenses resulting in closure of mining ventures;

(c) inability to repay loans resulting in forced sale/repossession of properties,

being adjudicated bankrupt, and blacklisted by banks; and

(d) hefty legal fees, loss of reputation, loss of opportunity costs, unemployment, humiliation and mental anguish.

[29] Although the pleaded claim by the plaintiff consist of allegation of perjury, fraud, forgery, conspiracy, malicious prosecution or abuse of process against D1 and the rest of the defendants, the statement of claim does not reflect as such (refer to paras 32–70 of the statement of claim). The plaintiff's claim against D2–D5 according to the statement of claim was premised solely on the evidence given by D2-D5 in Suit 1333 (the first suit). For D2, the claim was specifically to the purported false evidence given by D2 in Suit 1333 (the first suit) vide the 12 February 2008 affidavit and the oral evidence adduced at the trial as the plaintiff's subpoenaed witness on 1 July 2015. D2–D5 were not parties to Suit 1333 (the first suit) but only appeared as witnesses who gave evidence during the trial of Suit 1333 (the first suit) before the High Court.

[30] The claim for malicious prosecution is only against D1. Hence, for D2–D5, questions 2 and 3 are not relevant because D2–D5 were not a party to the Suit 1333 (the first suit) and that the plaintiff did not plead a cause of action of malicious prosecution against D2–D5.

[31] The loss and damage allegedly suffered by the plaintiff according to the pleaded case, is the loss and damage suffered by the plaintiff *in respect of his claim in Suit 1333 (the first suit)*. We refer to the following paragraphs of the statement of claim:

> 32. The Plaintiff states that in the course of defending the 1333 Suit, the 1st Defendant together with the rest of the Defendants, vide their fraudulent and/unlawful acts, committed perjury, fraud and the tort of abuse of court process. Such acts were committed at the expense of the Plaintiff and *to cause the Plaintiff damage and loss with respect to his claim under the 1333 Suit*.
>
> 33. The Plaintiff further states that in the course of defending the 1333 Suit, the 1st to 6th Defendants or any of them in part, vide their fraudulent and/unlawful acts, fabricated and/or forged documents and introduced fabricated evidence knowing that they were false. Such acts were committed at the expense of the Plaintiff and *to cause the Plaintiff damage and loss with respect to his claim under the 1333 Suit*.
>
> 34. The 1st to 6th defendants or any of them in part conspired to defraud and combined amongst themselves with the intention to injure the Plaintiff through unlawful means.

[32] From paras 32–70 of the statement of claim, it is all with regard to allegations of perjury, fraud, forgery, conspiracy, malicious prosecution against D1–D5. Where the particulars are given, the allegations are in respect of false

evidence allegedly given by the defendants in the course of giving evidence in Suit 1333 (the first suit). For this we refer to:

(a) paras 32–33, 35–36 and 38–40 of the statement of claim for the alleged tort of perjury;

(b) paras 34, 37, 44, 47, 50, 54, 59 and 62–64 of the statement of claim for the tort of conspiracy;

(c) paras 66–70 and 72 of the statement of claim for the tort of malicious prosecution; and

(d) paras 32, 65 and 72 of the statement of claim for the tort of abuse of process.

[33] We will proceed to address the issues in relation to the questions posed.

Whether witness immunity should be determined at a full trial of the second suit and not at the striking out application

[34] This particular issue was not raised in the questions posed but it is an issue which needs to be addressed, nevertheless.

[35] We take note that these appeals are in relation to D1–D5's striking out applications against the plaintiff's claims in Suit 460 (the second suit).

[36] The plaintiff argued that witness immunity could only be determined at a full trial and not via a striking out application as done by the High Court in Suit 460 (the second suit). Reason being, the causes of action pleaded in the second suit against D1–D5 is for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process, the fabrication of documents, preparation and filing of false witness statements and conspiracy to defeat the plaintiffs claim and additionally malicious prosecution, all warrant evaluation and analysis of documentary and or/witness evidence via full trial before the court. The plaintiff pleaded that it was during the trial of Suit 1333 (the first suit) that D1 conspired with the other defendants to support the false claims and/or fabrication of facts alleged by D1 in the affidavits and testimonies of D2–D5 and/or by producing and/or fabricated documents in order to cause injury and damage to the plaintiff, namely to defraud the plaintiff and hinder and/or delay the proceedings of Suit 1333 (the first suit) which resulted in damage to the plaintiff. The false affidavits, fabrication of facts and use of and fabrication of documents were the plan and/or strategy for the conspiracy throughout the proceedings in Suit 1333 (the first suit).

[37] It was further submitted by the plaintiff that the conspiracy and fraudulent acts of D1–D5 go beyond their testimonies in court as D1 together

with D2–D5 had committed fraudulent acts, namely coercion and manipulated witnesses (Kong Ah Choo, Edward Moses and Law Swee Haw who had since lodged police reports against D1–D6) to abet and support D1's false and fabricated documents and facts and intimidation of witnesses to sabotage the plaintiff's trial in Suit 1333 (the first suit). The aforesaid acts were only discovered by the plaintiff after the conclusion of Suit 1333 (the first suit).

[38] The plaintiff's stand is that whether witness immunity is applicable to D1–D5 should be determined at a full trial and not summarily as in the present case. The plaintiff referred to *Reynolds v The City of Kingston Police Services Board et al* 84 OR (3d) 738 where the Court of Appeal there recognises that the law with respect to the scope of witness immunity should not be resolved at the pleading stage but could only be determined at trial on the basis of complete factual record. A detailed analysis of this case is available in this judgment at para [68].

[39] In the determination of whether it is possible to strike out the plaintiff's claim summarily at the pleadings stage, premised upon witness immunity, we refer to the cases of *Jones v Kaney* [2011] 2 WLR 823, *Darker and others v Chief Constable of the West Midlands Police* [2001] 1 AC 435; [2000] 3 WLR 747; [2000] UKHL 44 and *Arthur JS Hall & Co (a firm) v Simons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615, to name a few. In *Jones v Kaney*, the claimant was injured in a road traffic accident. He had instructed Dr Sue Kaney, a psychologist expert witness to testify at his trial as to damages sustained as a result of the accident. Dr Sue Kaney was said to have negligently signed a statement, which essentially agreed with the expert instructed by the opposing party. In the process, Dr Sue Kaney made certain concessions that significantly weakened Jones's claim. As a result, Jones had to settle his claim for much less than he would have obtained if Dr Sue Kaney had not been negligent. Jones sued Dr Sue Kaney in another suit for negligence and Dr Sue Kaney defended relying on the defence of witness immunity from suit as laid down in *Stanton and another v Callaghan and others* [2000] QB 75 which held the principle that an expert witness who gives evidence at a trial is immune from suit in respect of anything which they say in court, and that immunity will extend to the contents of the report which they adopt as, or incorporate in their evidence. Dr Sue Kaney succeeded in getting Jones's claim struck out before trial of the second suit on an application before the High Court premised on witness immunity from suit because the High Court was bound by the Court of Appeal ruling in *Stanton v Callaghan*. The judge of the High Court issued a certificate allowing Jones to 'leapfrog' the Court of Appeal and go straight to the Supreme Court to appeal against his decision on a point of general importance. Although the Supreme Court, by a majority of five to two, decided that expert witnesses were not immune in the law of England and Wales from claims in tort or contract for matters connected

with their participation in legal proceedings, what is pertinent to take note is that the striking out application was instituted in the second suit before the commencement of the full trial. The court of first instance had struck out the claim by Jones when it decided that witness immunity applied there. In other words, witness immunity was determined by the court summarily at the pleading stage.

[40] The case of *Darker* started as a criminal case and there was an express-findings by the trial judge in the criminal case that the police had been significantly at fault in the disclosure process and he directed that the charges be permanently stayed on the ground of abuse of process and the plaintiffs were accordingly discharged. The plaintiffs then commenced a civil action against the Chief Constable of the West Midlands Police claiming damages for conspiracy to injure and the tort of misfeasance in public office committed by police officers under his direction and control. No claim was brought for malicious prosecution. A statement of claim (which was subsequently amended) was issued and served on the Chief Constable. The Chief Constable applied to strike out the statement of claim where Maurice Kay J, following the principles stated by the Court of Appeal in *Silcott v Commissioner of Police for the Metropolis* [1996] 8 Admin LR 637, struck out the amended statement of claim premised on witness immunity and dismissed the action. Again to take note that, the second suit was struck out summarily without the need to go for trial.

[41] In *Hall v Simmons*, which involved three cases heard together. In the first case, which concerned a protracted dispute for a building, where the plaintiff's solicitors acted for the opposite side. In the second case, during matrimonial ancillary relief proceedings, the plaintiff's solicitors failed to provide her with proper advice on the valuation and division of the proceeds of a sale and lodged a minute of order which recorded an inaccurate valuation. The third case was also during matrimonial ancillary relief proceedings, where the plaintiff's solicitors had advised the plaintiff on the appropriate level of periodical payments and on the possibility of contributions from the husband's cohabitee. However, on the day of the trial, a different counsel appeared and persuaded the plaintiff to settle for less on the relief premised on the incorrect assumption that the husband's relationship with the cohabitee had ended. All plaintiffs in the three cases filed negligence claims against their former solicitors in a second suit. In all cases, the judges in the second suits concluded that the solicitors enjoyed immunity from suit and struck out the claims against them as an abuse of process of the court.

[42] Given the aforesaid, the authorities demonstrated that witness immunity were decided at a striking out proceedings before the commencement of a full trial.

[43] Also pertinent to note that, there were already a determination of the relevant torts in the first suit in each of the cases referred to. In *Jones v Kaney*, Dr Sue Kaney was negligent in the first suit which resulted in Jones getting a considerably low damages than what he could have been able to achieve. In *Darker* there were express findings by the court that the police officers were significantly at fault for the torts in the first suit before the plaintiffs proceeded to sue the Chief Constable for conspiracy to injure and misfeasance in public office in the second suit. In *Hall v Simmons* there were already findings in the first suit on the negligence of the solicitors. Contrast the aforesaid cases with the facts in the present appeals.

[44] In our present appeals, there were no express findings in Suit 1333 (the first suit) of the torts of fraud, perjury, malicious prosecution, abuse of process or conspiracy that are being alleged against the defendants in Suit 460 (the second suit) or by the Court of Appeal in Appeal 1694.

[45] From the pleaded case in the present appeals, the allegations of the wrongful acts of the defendants of conspiracy of the defendants to dupe, coerce and manipulate witnesses who had lodged police report against D2–D6, to abet D1 in fabricating documents and facts resulted in the plaintiff suffering loss and damage with respect to his claim in Suit 1333 (the second suit). Whatever its worth of the wrongful acts of the defendants against D2–D6, to abet D1 in fabricating documents and facts, in giving false evidence in Suit 1333 (the first suit) obviously did not sway the learned judge to believe the defendants' testimony, because at the end of the trial the Court of Appeal decided in favour of the plaintiff. There was no damage or loss to the plaintiff in Suit 1333 (the second suit) as he obtained what he prayed for in that suit.

[46] Witness immunity rule protects parties or witnesses from actions based on their acts or statements within judicial proceedings. If at the striking out application, it is determined that witness immunity applies then the case would be struck out without having to go for trial. However, if the determination at the striking out application is that witness immunity is not applicable only then the case goes for trial. By parity of logical reasoning, it would defeat the whole purpose of invoking witness immunity, if a witness is to go for full trial first to determine whether immunity applies, as he would have been vexed at the full trial in the second suit when defending the claim by the plaintiff.

[47] No matter how the plaintiff dressed or crafted the causes of actions in Suit 460 (the second suit) it is pertinent to scrutinise the particulars of the pleadings of the relevant torts alleged against the defendants. In the present appeals the pleadings disclosed that Suit 460 (the second suit) arose from the

testimony and acts of witnesses in the course of judicial proceedings. The pleadings failed to disclose that the claim failed outside the bounds of witness immunity.

[48] Therefore, witness immunity is to be determined at the striking out application at the pleading stage, before proceeding for full trial.

Public policy considerations underlying witness immunity

[49] To identify the extent of witness immunity is to first examine the rationale or the grounds of public policy considerations which explains the basis of such immunity.

[50] Simon LJ Brown in *Silcott v Commissioner of Police for the Metropolis* [1996] 8 Admin LR 637 said that 'the public policy purposes underlying the immunity is two-fold, firstly, to protect persons acting bona fide, who under a different rule would be liable not perhaps to verdicts and judgments against them but to the vexation of defending actions (refer to *Munster v Lamb* (1883) 11 QBD 588). Secondly, to avoid multiplicity of actions in which the value or truth of their evidence would be tried over and over again (refer to Lord Wilberforce in *Roy v Prior* [1971] AC 470). This relates to core immunity.

[51] The public policy consideration also demands the finality of litigation that places limitations on issues which had been determined in a court of law. Lord Wiberforce in *Ampthill Peerage Case* [1976] 2 All ER 411 at p 417 said in his judgment that 'The law knows, and we all know, sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality'.

[52] The other policy consideration is the proliferation of an ad infinitum/satellite litigation especially in cases as in the present appeals where the plaintiff had been successful in Suit 1333 (the first suit) and now is mounting Suit 460 (the second suit) against the same defendant (D1) and witnesses (D2–D5) from Suit 1333 (the first suit). This is undesirable in the interest of a fair and an efficient administration of justice if there is a recurring chain like course of litigation (refer to *Rondel v Worsley* [1969] 1 AC 191 at p 251). This is what happened in *Lee Tat Development* and our present appeals.

[53] From these policy considerations manifest various principles of law, namely, amongst others, res judicata, estoppel, laches, abuse of process and witness immunity.

Witness immunity under common law

[54] Question 1 touches on whether the common law principle of immunity of a party and witness from liability in a civil action, subsequent or otherwise, in respect of evidence, oral or written given in judicial proceedings, is absolute.

[55] Before we go to set out our analysis giving rise to the decision, we will consider in summary the position in some commonwealth jurisdictions. Common law has recognised that witness of facts who testified in the course of judicial proceedings are immune from civil suits. The principle of witness immunity has been entrenched in the law as a matter of public policy to ensure that a witness can testify in court and in the preparation of evidence to be so given, without fear of a subsequent civil suit against him/her.

The UK position

[56] The English Court of Appeal in *Marrinan v Vibart and another* [1963] 1 QB 528 explained the rationale for the principle of witness immunity for statement made in the course of judicial proceedings before the court and it is absolute under common law:

> Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.
>
> Lord Esher has been well cited too, in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*. He says: 'It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice. 'In this case it is not suggested that there is any difference between the proceedings in a criminal court and the proceedings before the Masters of the Bench of Lincoln's Inn'.

[57] The rationale for having such immunity was later reiterated by Lord Wilberforce in the House of Lords' case of *Roy v Prior* [1971] AC 470 when he said:

> The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred on witnesses in respect of evidence given in *court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again.*

[58] The House of Lords in *Roy v Prior* went further to explain the extent of the absolute immunity accorded to the witnesses, namely that it cannot be circumvented even by the allegations of conspiracy between witnesses to make false statements:

> It is well settled that no action will lie against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given (see *Dawkins v Lord Rokeby* and *Watson v M'Ewan*). If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie (see the judgment of Lord Goddard CJ in *Hargreaves v Bretherton*). Nor is this rule to be circumvented by alleging a conspiracy between witnesses to make false statements (see *Marrinan v Vibart*).

[59] The common law principle of absolute immunity of a witness is divided into two distinct categories, namely:

(a) core immunity in respect of the giving of evidence in court as established in *Roy v Prior*. It covers:

(i) evidence at trial (see *Hargreaves v Bretherton and another* [1959] 1 QB 45); and;

(ii) affidavit evidence (see *Revis v Smith* (1856) 139 ER 1314);

(b) extended immunity in respect to the carrying of acts preparatory to the giving of evidence in court as established in the case of *Arthur JS Hall & Co (a firm) v Simmons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615. The English Court of Appeal held that the immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court.

The Australian position

[60] The Australian Courts upheld the long-established rule of witness immunity based on the same public policy grounds under common law.

[61] The High Court of Australia in *Cabassi v Ferrando* (1940) 64 CLR 130 stated the underlying policy of witness immunity and it cannot be circumvented by framing an action in conspiracy. Reason being for the protection of witnesses for the advancement of public justice. In this regard Starke J held that:

> No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however, false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against juries in respect of their verdicts ...
>
> *But it does not matter whether the action is framed as an action for defamation or as an action analogous to an action for malicious prosecution or for deceit, or as in this*

> *instance, for combining or conspiring together for the purpose of injuring another; the rule of law is that no action lies against witnesses in respect of evidence prepared, … given, adduced or procured by them in the course of legal proceedings.* The law protects witnesses and others, not for their benefit, but for a higher interest, namely the advancement of public justice … The remedy against a witness who has given or procured false evidence is by means of the criminal law or by the punitive process of contempt of Court … (Emphasis added.)

[62] In another High Court of Australia case of *D' Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, although it involved immunity of advocates, the court affirmed the general witness immunity in Australia (paras [39]–[99]). It held that the immunity extends to 'preparatory steps and out of court conduct that is intimately connected with the giving of evidence in court'.

[63] In the Supreme Court of New South Wales in the case of *Commonwealth v Griffiths* [2007] NSWCA 370, it was held by Young CJ that there is clear public policy that witnesses have immunity in respect of their evidence and in respect of what they did in preparing to give evidence. The rationale is not to confer benefit to witnesses but to protect the court system from abuse. Although Young CJ observed that 'there are dicta in some of the English cases like *Darker* which held that fabrication lies outside the immunity rule', nevertheless held at paras [148]–[151] that it was made clear in *Cabassi* that the policy was that 'subsequent action for fabrication of evidence or perjury was to be dealt in the areas of criminal law and that all conduct of witnesses was covered by immunity'.

[64] The Australian Courts took the general approach that immunity applies to preparatory steps in civil claims and have not adopted the *Darker* approach which was taken by the English House of Lords.

The Singapore position

[65] The Singapore Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50 at p 101 recognised the existence of witness immunity as being one of the factors whereby the court did not recognise the tort of malicious prosecution in civil proceedings:

> [101] Indeed recognising malicious civil prosecution would not only circumvent the doctrine of absolute privilege, but would also undermine the doctrine's underlying policy rationale. As noted by this court in *Goh Lay Khim v Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546 … at [66], absolute privilege covers statements made in the course of judicial or quasi-judicial proceedings, even those which are untrue and made maliciously. This includes everything that is done from the inception of the proceedings onwards and extends to all pleadings and other

documents brought into existence for the purpose of the proceedings (see the English Court of Appeal decision of *Lincoln v Daniels* [1962] 1 QB 237 257 per Devlin LJ).

The Canadian position

[66] Canada also adopted the well-established rule of witness immunity when giving evidence in courts and extends to statements by a witness in the preparation of evidence to be presented in court (*Elliott v Insurance Crime Prevention Bureau* [2005] NSJ No 323 at para [114]). *Elliot* however, does not form any opinion on whether *Darker* was applicable. However, it opined that the focus in *Darker* was on the distinction between the activities of a witness and that of an investigator and that only acts done for the purpose of preparing evidence for actual or contemplated proceedings fall within the ambit of the immunity. The court in *Elliot* recognised that absolute immunity of witnesses exists as it was necessary to protect the proper functioning of the system and administration of justice (see para [116]).

[67] However Canada does not set a clear stand on whether the immunity applies to fabrication of documents at civil trials.

[68] The case of *Reynolds v Kingston (City) Police Services Board* 84 OR (3d) 738, referred to by the plaintiff in his submissions is in relation to the issue of whether the case ought to proceed to a full trial when it involves issues of witness immunity. The mother of a seven year-old murder victim was charged with murder after a pathologist, acting in compliance with a warrant issued under the Coroners Act (Ont), conducted an autopsy which concluded that the death was the result result from stab wounds which were inflicted with a knife or a pair of scissors. These conclusions by the pathologists in his testimony at the mother's preliminary inquiry. The murder charges against the mother were dropped when a second autopsy by the same pathologist, and others, disclosed that the death was caused at least partly from dog bites. As a result, the mother sued the pathologist for negligence in the conduct of his first autopsy. However, the claim did not cover the pathologist's testimony at the preliminary inquiry. The mother applied to add a claim for misfeasance in public office, and the pathologist invoked the witness immunity rule and moved under r 21.01(1)(b) of the Rules of Civil Procedure to strike the mother's statement of claim for failure to disclose a reasonable cause of action. The Ontario Court of Appeal restored Masters' decisions allowing the mother's motion and dismissing the pathologist's when it ruled that this was not plain and obvious case that the mother's claims would fail. There was an issue for trial respecting the ambit of both the witness immunity rule and the 'constantly evolving' tort of misfeasance in public office. The claims were allowed to proceed for full trial for resolution on the basis of a complete factual record.

This case relates to claim based on the tort of negligence and misfeasance in public office.

The position in Hong Kong

[69] The Hong Kong Court of Appeal recognised and accepted the rule of witness immunity in its jurisprudence (refer to *Yanfull Investments Ltd v Datuk Ooi Kee Liang* [2017] 5 HKC 42).

The position in Malaysia

[70] To date this court has never determined on the issue of witness immunity. Reference has been made by the defendants' counsel to this court to the judgment in *Takako Sakao v Ng Pek Yuen & Anor (No 3)* [2010] 2 MLJ 141. However, the reference by this Court in that case as to witness immunity is obiter and is not the ratio of the case. The actual focus in *Takako Sakao* was on the issue of whether court has the power to direct a non-party to pay the costs of any suit, appeal or any proceeding, which was held to be already settled law. This court then set out the guidelines as set out by Balcombe LJ in the English Court of Appeal case of *Symphony Group Plc v Hodgson* [1994] QB 179 for the making of costs against a non-party to a suit. This is where one of the guidelines stated as follows:

> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings; one reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer & Anor v Durnford Ford (a firm) & Anor* [1992] QB 483 at p 487 (in so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle);

[71] The court noted that applying for costs against a witness or their associated entities based on their testimony introduces an exception to this immunity.

[72] Despite the lack of case laws in the apex court, there are several Malaysian High Court cases that addressed on the issue of witness immunity.

[73] One such case is the case of *Dato Sri Mohd Najib bin Hj Abd Razak v AmBank Islamic Bank Bhd & Ors* [2020] MLJU 2593 the High Court has the

occasion to address the issue of witness immunity. The plaintiff's suit was commenced due to the evidence of the third defendant in the SRC case, which the plaintiff discovered that the alleged acts and omissions tantamount to breach of duty and negligence. The plaintiff, Dato' Sri Mohd Najib bin Hj Abd Razak, claimed that the first, second, and third defendants breached fiduciary duties related to his accounts maintained with the first defendant. These breaches allegedly led to unauthorised transactions and wrongful disclosure of his accounts to unauthorised parties. As a result, the plaintiff was charged with criminal offences, causing emotional distress, loss of reputation, embarrassment, and a deprivation of his personal liberty and lawful political position. The plaintiff sought special, general, aggravated, and exemplary damages.

[74] The first, second, and third defendants therein filed striking out applications under O 18 r 19(1)(a), (b), and/or (d) of the Rules of Court 2012 ('the ROC 2012'), and/or the inherent jurisdiction of the court. The court allowed the applications, leading the plaintiff to appeal on the decision. The court held that the third defendant enjoys absolute immunity which protects the third defendant from being sued due to the evidence given in the SRC case.

[75] As decided by the court, it is a necessary part of the judicial machinery which advances public justice, where the court is obliged to protect the witness from being put on trial and her evidence in another case re-examined.

Whether such immunity absolute?

[76] Questions then arose as to whether such immunity conferred on witnesses is absolute? The plaintiff in the present appeal, submitted that there are exceptions to the witness immunity rule which is purportedly applicable to the present appeal, which manifests in the decisions of the following cases:

(a) *Jones v Kaney* [2011] 2 AC 398;

(b) *Surzur Overseas Ltd v Koros and others* [1999] All ER (D) 200;

(c) *Darker and others v Chief Constable of the West Midlands Police* [2001] 1 AC 435; [2000] 3 WLR 747; [2000] UKHL 44; and

(d) *Singh v Reading Borough Council and another* [2013] 1 WLR 3052.

[77] The Supreme Court case of *Jones v Kaney* held that the immunity is not absolute when there is a breach of duty by an expert witness, as an expert witness owes a duty to his client by whom he has been retained. Breach of such duty in the normal course give remedy to such breach. However, *Jones v Kaney* established that witnesses of fact has complete immunity from any civil action as evident from the following excerpts from the judgment:

> 65. It has long been established that w*itnesses of fact enjoy complete immunity* — immunity, that is, from any form of civil action in respect of evidence given (or foreshadowed in a statement made) in the course of proceedings. It is no less clearly established, following *Arthur JS Hall & Co (a firm) v Simons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 that advocates have no immunity from suit in respect of any aspect of their conduct of proceedings (save, of course, from defamation claims and the like pursuant to the absolute privilege attaching to court proceedings).
>
> 66. *The absolute immunity rule which applies to witnesses of fact, as noted by Lord Hoffman in Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177*, 208: 'is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. 'That aside, witnesses of fact are unlikely to owe the party calling them any duty of care in contract or in tort.* (Emphasis added.)

[78] It is to be noted that the facts in *Jones v Kaney* are at variance with our present appeal as the witness concerned was an expert witness. We have set out the facts of *Jones v Kaney* when we addressed the striking out issue in the beginning of this judgment. The plaintiff's claim was struck out by the English High Court premised on witness immunity. It went on appeal to the Supreme Court where the Supreme Court in allowing the plaintiff's appeal distinguished the application of witness immunity to witness of fact and that of expert witness. It was held that witness immunity was not absolute as far as expert witnesses are concerned:

> 64. Expert witnesses are to be regarded as sui generis in the present context. There are profound differences between them and, on the one hand, witnesses of fact; on the other hand, advocates. (For the purposes of this brief judgment I mean by 'an expert witness' a witness selected, instructed and paid by a party to litigation for his expertise and permitted on that account to give opinion evidence in the dispute. I am not referring, for example, to a treating doctor or forensic pathologist, either of whom may be called to give factual evidence in the case as well as being asked for their professional opinions upon it without them having been initially retained by either party to the dispute.)
>
> ...
>
> 67. In stark contrast, not only do expert witnesses clearly owe the party retaining them a contractual duty to exercise reasonable skill and care but, I am persuaded, the gains to be derived from denying them immunity from suit for breach of that duty substantially exceed whatever loss might be thought likely to result from this. These pros and cons have been fully explored in the judgments of other members of the court. Suffice to say that in my opinion the most likely broad consequence of denying expert witnesses the immunity accorded to them (only comparatively recently) by the decisions in *Palmer v Durnford Ford* [1992] QB 483 and *Stanton v Callaghan* [2000] QB 75 will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date. I for one would welcome

this as a healthy development in the approach of expert witnesses to their ultimate task (their sole rationale) of assisting the court to a fair outcome of the dispute (or, indeed, assisting the parties to a reasonable pre-trial settlement). A

[79] The witnesses (ie D1–D5) in our present appeal are not expert witnesses as in *Jones v Kaney*. They are witnesses of facts. The exception in witness immunity in *Jones v Kaney* clearly was on testimonies from expert witnesses: B

> 38. *I propose to consider the following issues in relation to expert witnesses*. (i) What are the purposes of the immunity? (ii) What is the scope of the immunity? (iii) Has the immunity been eroded? (iv) What are the effects of the immunity? (v) Can expert witnesses be compared to advocates? (vi) Is the immunity justified? (vii) Should the immunity be abolished? (Emphasis added.) C

[80] Therefore, the exception as stated in *Jones v Kaney* is not applicable to the present appeal. It affirms the position that the immunity afforded to witnesses of facts, is absolute and complete from any form of civil action in respect of evidence given in the course of proceedings. The rationale is to encourage witnesses to give evidence without fear of being prosecuted or being sued (refer to paras 65–66 of the judgment). In addition, there is no duty of care in contract or tort owed by witnesses of fact to the parties who called them to testify in court. D E

[81] *Surzur Overseas Ltd* is a case not aimed at solely deploying false evidence but a conspiracy to deceive Surzur and manipulate court proceedings. The conspiracy extended beyond mere false evidence; it involved creating and deploying false documents, making fraudulent statements and orchestrating actions that sought to undermine the mareva injunction order thereby facilitating the sale of assets in a deceitful manner. F

[82] Unlike the case of *Surzur Overseas Ltd*, a perusal of paras 50–52 of the statement of claim in our present appeals disclose that the plaintiff's claim against the D1–D5 are concerned essentially with the evidence given by the said defendants in the proceedings of Suit 1333 (the first suit). Nothing was plead by the plaintiff in the present appeal as to any acts of D1–D5 on falsifying and/or manufacturing documents in his claim, let alone any aim and/or objective and/or more importantly, agreement to the purported conspiracy between the defendants to injure the plaintiff. G H

[83] *Darker and others v Chief Constable of the West Midlands Police* [2001] 1 AC 435; [2000] 3 WLR 747; [2000] UKHL 44 (House of Lords) was a case of police malpractice where the plaintiffs allegedly fabricated evidence against them in the course of police investigation conducted by the defendants which led to the prosecution of the plaintiffs. However, the plaintiffs' claim was struck out at first instance on grounds that the plaintiffs' allegations against the I

A defendant were covered by absolute witness immunity. In allowing the appeal, the House of Lords narrowed the scope of witness immunity by distinguishing between evidence given in court and the deliberate fabrication of evidence, noting that witness immunity applies only to the former:

B > There is, in my opinion, *a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence*, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect.
>
C > In practice the distinction may appear to be a fine one, as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made.
>
D > But I consider that the distinction is a real one and that the first example comes within the proper ambit of the immunity and the other does not.
>
> ...
>
> This view is not in conflict with the principle that immunity (where it exists) is
E > given to a malicious and dishonest witness as well as to an honest witness, and I think that the honest (though negligent) examination of articles to enable a statement of evidence to be made comes within the concept of the preparation of a statement of evidence, whereas the deliberate fabrication of evidence to be referred to in a statement of evidence does not come within that concept. (Emphasis added.)

F

[84] The plaintiff relied heavily on the case of *Darker* to support the argument that the current claim against D1–D5 is not subject to witness immunity, as it involves allegations of evidence fabrication. The plaintiff contends that applying the witness immunity rule would contradict the policy
G that no wrong should go without a remedy.

[85] However, it is our view that *Darker* has no application to the present appeal as *Darker* was premised on different set of facts. It involved an action against the West Midlands Police for conspiracy to injure the plaintiffs and
H misfeasance in public office. The elements of public policy and protection against state machinery were significant considerations and factors in the determination of the case. It is these considerations which influenced the court's approach and the outcomes related to accountability and the rights of individuals against the police.

I

[86] The difference in the set of facts in the present appeals are, firstly, the suit is between private individuals. It is in sharp contrast to the facts in *Darker*. All the defendants were never investigators who procured and/or collected evidence to be used and/or produce in court proceedings such as the police in

Darker.

[87] Secondly, *the plaintiff did not plead any acts of fabrication of 'extraneous' evidence outside of Suit 1333 (the first suit)* against the defendants. *The allegations revolved on matters said or done in the course of court proceedings, in the defence and counter claim of the Suit 1333 (the first suit)*. They form part of the court proceedings.

[88] The other pertinent point is that *there were no express findings in Suit 1333 (the first suit) as to perjury or even fabrication of extraneous evidence.* Unlike *Darker* where there were express findings in the criminal proceedings that the police had been at fault in the disclosure process and there were abuse of process. The present appeals consist of the allegations of fabrication against the defendants in the pleadings which are general with no specifics. In *Darker* the fabrication of evidence was committed by the police officers in their capacity as investigators, which is totally absent in the present appeals.

[89] Thirdly, unlike *Darker*, the plaintiff in our present appeal suffered no 'wrong which required remedy', as the plaintiff had already obtained judgment against D1 in Suit 1333 (the first suit) and/or Appeal 1694. The plaintiff had been fully compensated by the interests on the judgment sum and/or costs awarded to the plaintiff by the Court of Appeal in Appeal 1694 which had been settled. There were no express findings by the court in Suit 1333 (the first suit) that the plaintiff suffered damage in the context of *Darker*. As the plaintiff was the successful litigant, and he had obtained remedy, he cannot be said to have been wronged. The competing public policy considerations as illustrated by *Darker* (no wrong ought to be without remedy) does not feature in the present appeals.

[90] Lord Hutton in *Darker* held that the witness immunity is essentially related to the giving of evidence, and made the distinction 'between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence'. Importantly, it must be noted that this case relates to acts done *outside the courtroom, and not evidence given in the court*. Therefore, this decision must be understood in its context that the *witness immunity does not extend to cover fabrication of evidence by police who fabricates the evidence to support the evidence he will give in court*.

[91] Given the aforesaid, premised on the facts and nature of the claim in *Darker* compared to the present appeals, clearly *Darker* is distinguishable and hence, inapplicable to the present appeals. Therefore, *Darker* (in the sense that the rule was not extended) has no application to the present appeals. The immunity also be extended (for things said or done in the course of courts

proceedings), namely in the defence and counterclaim of Suit 1333 (the first suit). They form part of court proceedings.

[92] *Daniels and others v Chief Constable of South Wales Police* [2015] EWCA Civ 680 was also cited by the plaintiff in their submissions for justifications that not in every cause of action which includes an averment that false evidence was given which will be struck out on the basis of witness immunity. This case is in relation to civil claims of malicious prosecution, unlawful detention, and misfeasance in public office brought against the Chief Constable of South Wales Police by former police officers (Mr Daniels, Mr Gillard, and Mr Murray). These officers, were initially convicted of the 1988 murder of Ms Lynette White, a conviction that was later quashed due to severe criticisms of the police investigation. The case revolves on the issue of the scope of absolute immunity afforded to police officers in the context of initiating, continuing, and conducting criminal proceedings. The case examined whether this immunity extends beyond the conventional boundaries of witness immunity to include actions closely associated with the prosecution process, namely the handling of evidence and prosecutorial decisions.

[93] The Court of Appeal upheld the decision of Gilbart J, who allowed the appeals by Mr Daniels, Mr Gillard, and Mr Murray against the interlocutory orders of Judge Seys Llewellyn QC. The judges allowed the respondents to amend their pleadings to include claims of misfeasance in public office, thereby expanding the scope of their allegations beyond malicious prosecution and unlawful detention.

[94] The Court of Appeal critically assessed the breadth of the immunity claimed by the Chief Constable, particularly focusing on whether actions such as the concealment, destruction, or withholding of documentation during the prosecution process fall within the protected scope of immunity. The appellate court determined that the immunity should essentially cover statements made in the course of giving evidence and not be extended to actions to manipulate or obstruct the judicial process.

[95] Consequently, the Court of Appeal allowed the amendments to the pleadings, thereby rejecting the Chief Constable's argument for a broad interpretation of immunity. This decision emphasised the necessity to balance the protection of police officers from frivolous claims with the need to provide remedies against genuine misconduct. This is with regards to misfeasance in public office, very much different from the facts in the present appeals.

[96] The plaintiff also referred us to the case of *Singh v Reading Borough Council and another* [2013] 1 WLR 3052 which held that an action not brought on or in respect of any evidence given are not covered. This is to

support the argument that the purported deliberate actions and planning of the defendants, which are not part of Suit 1333 (the first suit), are not protected under the witness immunity rule. In this regard, it is important to note that the case of *Singh* is a claim against a local authority alleging discrimination and unfair constructive dismissal against a local authority. During the preparation for the hearing, the claimant alleged that a witness statement contained false accusations against the claimant had been made under undue improper pressure by the respondents.

[97] At a pre-hearing review, the employment tribunal decided that the contents of the witness statement and the conduct related to its preparation were protected by absolute judicial proceedings immunity. Consequently, the claimant could not use the allegation of undue pressure to support her constructive dismissal claim, leading to the relevant parts of her amended claim being struck out. The Employment Appeal Tribunal also dismissed her appeal.

[98] The English Court of Appeal in allowing the claimant's appeal, made a finding that the alleged untruths were in relation to how the witness's evidence was obtained in an out-of-court setting, rather than the content of the evidence itself, and thus witness immunity did not apply to the respondent.

[99] Apart from the fact that *Singh* is an employment claim, which differs from the present appeals. The gist of the action in *Singh* is not the allegedly false statement itself but is based on things that would form part of the evidence in judicial proceedings where the immunity is not extended. Lewison J held that on the facts of *Singh*, he considered the complaint was not to be about the contents of the statement, but it was about the means in which it was procured. *In such cases the principle that a wrong should not be without a remedy prevails*. Hence, *Singh* and the present appeals can also be distinguished because it was not plead by the plaintiff in the present appeals of any of the defendants exerted undue pressure, intimidated, or tampered with any witnesses or parties in Suit 1333 (the first suit) before and/or during the proceedings of Suit 1333 (the first suit).

[100] From the statement of claim as disclosed at paras 32–40, 44–47, 47, 50, 54, 59, 62–70, 72, do not show any real claim of fabrication or forgery against all the defendants capable of bringing the case outside of the immunity rule and neither does it falls outside the core immunity. The allegations are general without any particulars or specifics.

[101] The plaintiff complained that the Re Montri Report contained a false opinion by Montri Bonjadani. The maker was not called at trial which resulted in the report to be expunged. That opinion was not given by any of the defendants (refer to para 38.1 of the statement of claim).

[102] On the 'New Share Registry' where the plaintiff complained that the document was falsely adduced. It was never alleged in the pleadings that it was fabricated or forged by the defendants (see para 38.2 of the statement of claim).

[103] On the complaint by the plaintiff on the 'Letters of Irrevocable Instructions and Fake Invoices' which were adduced to rebut the claim that D6 misappropriated funds from Kong & Edward': from the pleadings, that has got nothing to do with the plaintiff (see para 40 of the statement of claim).

[104] Therefore, the plaintiff's allegations against the defendants in the present appeals, focus solely on the evidence provided by them during the proceedings of Suit 1333 (the first suit), and do not fall within the exceptions to the witness immunity rule, as established in *Singh*, *Surzur* and *Jones v Kaney*.

[105] The allegations against the defendants in the present appeal come within the ambit of the core immunity, namely it relates to the things done or said in the course of court proceedings. As for the things said or done outside court, they were said or done in the course of proceedings which comes within the extension to the core immunity.

[106] The rule as to immunity of witnesses is universal, in that it protects the innocent as well as the wicked. In this regard, Lord Hoffman in *Arthur JS Hall & Co (a firm) v Simmons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 at p 690 referred and quoted Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 when he said:

> It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule is otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that *it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.* (Emphasis added.)

[107] This principle was reiterated by Lord Hope in *Darker* at p 447 of the judgment:

> In the Court of Appeal Auld J said: The whole point of the first public policy reason for the immunity is to encourage honest and well-meaning persons to assist justice *even if dishonest and malicious persons may on occasion benefit from the immunity.* (Emphasis added.)

At p 468 of the same judgment:

> Furthermore, the authorities make it clear, as both Simon Brown and Auld LJJ observe, that where the immunity exists, it is given to those who deliberately and maliciously make false statements; the *immunity is not lost because of the wickedness of the person who claims immunity*. (Emphasis added.)

[108] In *Marrinan v Vibart*, the core immunity was also extended to protect witnesses against an action alleging a conspiracy by them to make false statement in court, which is one of the pleaded causes of action in our present appeal.

[109] The approach in the UK Courts is that core immunity remains intact. In cases where the core immunity is sought to be extended the approach is to be on a case to case basis depending on the facts.

Conclusion on witness immunity

[110] Given the authorities regarding witness immunity, it is our view that the High Court was correct in determining that the D1–D5 is entitled to rely on witness immunity or privilege. Whilst the rule is absolute in core immunity, there may be exceptions depending on the context and the specifics. It does not preclude prosecution for perjury, perverting the course of justice or for contempt of court, liability for malicious prosecution or misfeasance in public office (see *Jones v Kaney*). As the pleadings in the present appeals stand, nothing turns on the exceptions. The pleaded case in the present appeals do not relate to these exceptions. Therefore, the allegations against the defendants in the pleaded case come within the ambit of core immunity as it relates to what was said and things done in court in the course of judicial proceedings. As for things said or done in the course of proceedings and therefore comes within the extension to the core immunity. Absolute immunity applies to the defendants in our present appeals, which covers statements made in the course of judicial proceedings, even those which are untrue and made maliciously. This includes acts that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings. This is necessary to protect the proper functioning of the judicial system and administration of justice.

[111] It matters not, whether the action is framed as an action for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process, fabrication of documents, preparation and filing of false witness statements and conspiracy to defeat the plaintiff's claim and malicious prosecution, as in the present appeals, it is a rule of law that no action lies against witnesses in respect of evidence prepared, given, adduced or procured by them in the course of judicial proceedings. Consequently, D1–D5 is immune from any civil action concerning the evidence provided as the witnesses during the trial of Suit 1333

(the first suit), especially given that the plaintiff's action in the High Court herein is to claim damages against the D1–D5.

[112] In the circumstances, the plaintiff's claim against the D1–D5 is clearly unsustainable and should be struck out. Thus, the decision of the High Court does not warrant any appellate interference by the Court of Appeal. Based on the numerous cases outlined above, the Court of Appeal erred in law and fact by allowing the plaintiff's appeal and disregarding the application of witness immunity to D1–D5.

[113] Given the aforesaid, we answer question (1) in the positive.

[114] The determination by this court that the defendants were covered by absolute witness immunity is an overarching point which is sufficient to deal with the present appeals in its entirety. However, we proceed to address the other questions for the sake of completeness.

Question 2

[115] Question 2 is only relevant to D1 as D2–D5 were not parties to Suit 1333 (the first suit).

[116] It is the plaintiff's contention that the plaintiff's Suit 460 (the second suit) against D1–D5 is premised on a wholly different causes of action, from the plaintiff's causes of action in Suit 1333 (the first suit). As such, the High Court had erred in striking out the plaintiff's claim based on the doctrine of res judicata.

[117] Counsel for the defendants however premised the striking out of the Suit 460 (the second suit) premised on abuse of process.

[118] The categories of abuse of process can arise in various ways and never close. The factual matrix of our present case lends its context to the abuse. In our case the plaintiff had succeeded and obtained judgment and reliefs against D1 in Suit 1333 (the first suit). The judgment sum had been settled with interest. The background facts in Suit 460 (the second suit) relates to the same ECT Sale of Shares, the same acknowledgement of debt and the same alleged debt of RM8,018,225 as claimed in Suit 1333 (the first suit) to which he had been paid. All these had been litigated and canvassed in Suit 1333 (the first suit).

[119] Suit 460 (the second suit) is the second suit against D1. The plaintiff has succeeded in Suit 1333 (the first suit) and obtained whatever remedy with interests.

[120] The second claim by the plaintiff against D1 and the other defendants is an abuse of process. The plaintiff had been vindicated or was successful in the first suit cannot mount a second action against the same party in the first action based on the conduct and/or evidence of the said opposing party. This runs counter to the policy considerations as set out earlier.

[121] It would be a spectre to have a justice system where chain like litigation is allowed and proceedings will run ad infinitum with no end. This was demonstrated by *Lee Tat Development* and our present appeals.

[122] Apart from the aforesaid, there is no express findings of fabrication of evidence, the tort of perjury, fraud, forgery, conspiracy, malicious prosecution or abuse of process in Suit 1333 (the first suit). In any event, whatever its worth of those evidence (be it false, perjury or fabrication of false evidence, manipulation or coercion of witnesses), the plaintiff won in Suit 1333 (the first suit). The plaintiff already got his remedy in Suit 1333 (the first suit). This is in contrast to the facts in *Jones v Kaney, Darker* and *Hall v Simmons*, where the plaintiffs in those cases were without remedy. There were also no express findings in Suit 1333 (the first suit) that the plaintiff suffered loss/damage as was found in *Jones v Kaney, Darker* or the three cases in *Hall v Simmons*. Being a successful litigant in Suit 1333 (the first suit), the plaintiff in our present case, cannot be said to have been wronged. His pleaded claim at paras 32–34 states that the acts of the defendants caused him damage and loss with respect to his claim under Suit 1333 (the first suit) does not have a leg to stand on. It is certainly not supported by the facts, namely the decision of Suit 1333 (the first suit was decided in the plaintiff's favor. In other words, there is no damage or loss suffered with respect to his claim under Suit 1333 (the first suit).

[123] Damage or injury is an essential element of the tort of abuse of process as held in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ 340.

[124] Damage or injury is similarly, an essential element in a cause of action of conspiracy to defraud as held in the case of *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394:

> [32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage: (a) an agreement between two or more persons (that is an agreement between Tan Chong and others); (b) an agreement for the purpose of injuring Inokom and Quasar; (*c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar; (d) damage is an essential element and where damage*

is not pleaded the statement of claim may be struck out. (Emphasis added.)

[125] It is undisputed that the Court of Appeal in Appeal 1694 (which is the appeal to Suit 1333 (the first suit)) via the order dated 10 January 2019 had ordered interest on the judgment sum at 5%pa from the date of filing of Suit 1333 to the date of realisation.

[126] The plaintiff in our present case has been reasonably compensated by the award of interests on the judgment sum awarded to him by the Court of Appeal in Appeal 1694. As such, the plaintiff is precluded from claiming any form of damages stemming from D1's alleged refusal to pay to the plaintiff the RM8,018,225 due under the purported acknowledgment of debt.

[127] In this regard, the case of *Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 which held that:

> *Interest is a sum of money representing the return for the use or the compensation for the retention by one person of a sum of money belonging to or owed to another. In essence it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he had suffered because he had not that use. In other words, interest is a compensation for the deprivation of the use of money, which he is lawfully entitled to* (per Lord Wright in *Riches v Westminister Bank Ltd* [1947] AC 390, 400). (Emphasis added.).

[128] Suit 1333 (the first suit) and the present appeal bore similarities in actions and damages sought where the particulars pleaded are either based on the sale of the plaintiff's ECT Shares amounting to RM8,018,225 and/or D1's refusal to pay to the plaintiff the said sums (refer to paras 72 and 73 of the statement of claim of the plaintiff).

[129] As the plaintiff had been paid the judgment sum with interest for Suit 1333 (the first suit), it is an abuse of process if this court is to allow the plaintiff to attempt to claim new damages against the defendants based on essentially the failure of the D1 to repay the damages in the form of judgment sum which had already been adjudged in the sum of RM8,018,255 in the first suit.

[130] On the allegations of the alleged conspiracy between the defendants where false evidence were given against the plaintiff in Suit 1333 (the first suit) even if it is accepted, it is a fact that the evidence of all the defendants were already available during Suit 1333 (the first suit). It has also been dealt with substantially by the High Court in Suit 1333 (the first suit) as follows:

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> [31] The evidence tendered before me must be considered in totality. The crucial point to be decided was whether the defendant signed a document dated 6 November 2006 as claimed by the plaintiff or undated document as claimed by the defendant.
>
> [32] The defendant's evidence that the document was not dated when he signed it was supported by DW2 evidence. Having perused the whole evidence I accepted evidence by the defendant that the document he signed was not dated. On the totality of the evidence before me, it is my finding that the document was signed in escrow and gave to the plaintiff earlier than the stated date.

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[131] It has also been dealt with by the Court of Appeal in the majority judgment in Appeal 1694 (which is the appeal from Suit 1333 (the first suit)) which are as follows:

D

> [26] At the trial, the respondent had testified that he remembered signing the acknowledgement on 15 August 2006 because it was the birthday of his secretary, DW2. The respondent claimed that the date was altered to 6 November 2006.
>
> ...
>
> [29] According to the learned judge, it was under those circumstances that the acknowledgement was signed in escrow; that it was pending the fulfillment of these conditions precedent by the appellant. Thus, when the conditions precedent were not fulfilled, the appellant was not entitled to rely on the acknowledgement to recover any monies as no monies were due.
>
> [30] We find the conclusion reached by the learned judge plainly erroneous and not at all supported by the whole body of evidence before the court. On the contrary, there was abundant evidence to show that the respondent's claim that he signed the acknowledgment in escrow in August 2006 is inherently improbable. The evidence at the trial actually proved convincingly that the respondent did sign the acknowledgement on the date mentioned in the acknowledgement itself, that is, 6 November 2006.

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[132] Clearly, the subject matter of the present case has already been dealt with by the High Court in Suit 1333 (the first suit), the majority decision in the Court of Appeal (in Appeal 1694) and on appeal to the Federal Court. To allow Suit 460 (the second suit) to go for trial is to allow re litigation on the same issues which had been decided in Suit 1333 (the first suit).

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[133] Thus the learned High Court judge did not err when His Lordship held that it is an abuse of court process for the plaintiff to reopen or relitigate the issues again in the present appeals. The plaintiff's claim against D1–D5 concerned the evidence that was presented in Suit 1333 (the first suit) and the damages or loss claimed are all relating to the failure of D1 to pay the principal sum of RM8,018,225 expeditiously. His Lordship also found that there is clear substantial duplication of issues and reliefs of damages sought in Suit 1333 and

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A the present appeal. Such findings by the High Court did not warrant any appellate intervention by the Court of Appeal.

[134] We therefore answer question 2 in the negative.

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[135] The answers to question 2 is, by itself, also sufficient to dispose off the present appeals.

Question 3

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[136] Question 3 is also not relevant to D2–D5 as they were not parties to Suit 1333 (the first suit), and neither was malicious prosecution pleaded against them.

D **[137]** In the midst of the submissions, the counsel for D1 sought for leave to amend question 3 to read as follows:

> Whether the minority views as expressed in *Crawford* and *Willers* respectively and the decision of *Lee Tat Development* on the existence of the tort of malicious prosecution to civil proceedings are to be adopted in Malaysia?

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[138] It was objected to, by counsel for the respondent/plaintiff before us, however we note that the application for amendment to question 3 was raised in the written submissions of D1 which was made available to counsel for the F plaintiff before the oral hearing before us. Counsel for the plaintiff in his written submission at para 109 states that:

> [109] As the proposed amendment to question 3 by the first defendant, we submit that the same argument would apply and it should be answered in the negative.

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[139] There was no reservation made by counsel for the plaintiff/respondent in their written submission when they continue to answer the proposed amended question 3. In any event we had considered the objection by counsel for the plaintiff and ruled that there was no prejudice to the H plaintiff/respondent as the proposed amended question does not detract totally from the original question 3 and the plaintiff was given every opportunity to address the court on the proposed amended question. Therefore, we allowed D1's application to amend question 3 as proposed.

I **[140]** The amended question 3 refers to the majority decision of *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 and the decision of *Willers v Joyce and another* [2016] 3 WLR 477; [2016] UKSC 43.

[141] The majority decision in *Crawford Adjusters* is a decision of the Privy

Council which confirmed that the tort of malicious prosecution applies to civil as well as criminal proceedings. It concerned legal proceedings brought by a company against a loss-adjuster employee. A vice president of the company who had a grudge against the employee hired an independent loss adjuster to review the employee's work but limited the adjuster's access to specific information. As a result, the independent adjuster's reports were biased and distorted against the employee. Consequently, the legal proceedings caused him a significant loss. However, before the trial commenced, the company discontinued the action and judgment was awarded in favour of the employee. The employee then amended his counterclaim to include malicious prosecution and abuse of process. The Court of Appeal of the Cayman Islands held that the state of law at that point in time was such that the tort of malicious prosecution applied only to criminal proceedings.

[142] The Privy Council by majority disagreed and held that it was no longer valid to uphold the reasoning that limited the tort malicious prosecution in criminal proceedings and ruled that the tort should be available for civil proceedings as a matter of principle and policy. The reason given for the extension of the tort were the same rationale given as in *Darker* for refusing immunity to the police, namely the policy that 'wrongs should be remedied'. However, the dissenting judgment of Lord Sumption and Lord Neuberger held that extending the tort to civil cases could deter legitimate claims and lead to litigation ad infinitum/satellite litigation.

[143] *Willers v Joyce and another* [2016] 3 WLR 477; [2016] UKSC 43 is a landmark decision where the Supreme Court has shown a move towards a revival of the tort of malicious prosecution in English law. The decision opens up a potential cause of action for those who have suffered due to the launch of unsuccessful civil proceedings against them with malice and without reasonable cause. However, it is to be noted that *Willers* demonstrated a split decision of five to four. The four dissenting Law Lords gave reasons, which we viewed as compelling, as to why the application to civil proceedings should be limited, including:

(a) conflict with the principle that litigants do not owe a duty of care to their opponents;

(b) conflict with the principle of witness immunity;

(c) malicious prosecution is justified in criminal cases to prevent arbitrary prosecution but does not apply to civil proceedings due to different risks involved;

(d) civil law already provides a remedy through cross-undertakings in damages for victims of unjust orders;

(e) no compelling reasons for change to exist;

A (f) extending the tort to civil cases may lead to uncertainty in defining malicious conduct;

(g) risk of satellite litigation;

(h) unpredictable effects on other areas of law, such as defamation or
B privilege;

(i) 'chilling effect' on litigation, discouraging legitimate claims due to fear of malicious prosecution claims;

(j) increased litigation costs and delays to proceedings; and

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(k) practical difficulties in determining malice and recoverable damages in malicious prosecution claims.

[144] Prior to *Willers v Joyce* the House of Lords held that the tort was
D confined to criminal proceedings, until the Privy Council decided in *Crawford Adjusters*. However, the Supreme Court in *Willers* provides guidelines for a claimant to bring an action for malicious prosecution:

(a) proceedings were brought against it without reasonable cause and probable cause of action; and

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(b) the party bringing the proceedings did so maliciously. Lord Toulson noted that the element of malice requires the claimant to prove that the defendant deliberately misused the process of court. This involves establishing that the proceedings were not bona fide use of court process.

F

The Singapore position

[145] The Singapore Court of Appeal in *Lee Tat Development Pte Ltd*, has, in a landmark decision, held that the tort of malicious prosecution should not be
G extended to civil proceedings generally and that the tort of abuse of process is not recognised in Singapore.

[146] The Singapore Court of Appeal in *Lee Tat Development Pte Ltd* found that extending the tort of malicious prosecution to the civil context generally
H would undermine the principle of finality in the law, ie it would encourage unnecessary satellite litigation and drag out disputes. The Court of Appeal undertook a critical analysis of the majority and minority views in *Crawford Adjusters* and *Willers* and preferred the minority views.

I The Australian position

[147] Australia considers that this area of the law as a controversial one and appears to be unsettled. In the Supreme court case of *Clavel v Savage* [2013] NSWSC 775, Rothmans J observed that:

> It is controversial whether malicious prosecution is confined to the institution of criminal proceedings. The tort of malicious prosecution may also apply to certain disciplinary proceedings (*Little v Law Institute (Vic) (No 3)* [1990] VR 257), courts martials (*Forster v Mac Donald* (1995) 127 DLR (4th 185) and certain Bankruptcy proceedings (*Quartz Hill v Consolidated Mining Co v Eyre* (1983) 11 QBD 674; *QIW Retailers Ltd v Felview Pty Ltd* [1989] 2 Qd R 245). See generally the discussion in Gregory v Portsmouth City Council [2000] UKHL 3; ... discussed by Hoeben J in *Kable v New South Wales* [2010] NSWSC 811.
>
> [44] The discriminating feature identifying non-criminal proceedings that may give rise to a claim for malicious prosecution may well be proceedings that, by their very nature, damage the reputation and standing of the person accused, where the result of the judicial process cannot, itself, overcome the damage. Ordinary civil proceedings, even those involving serious allegations, are not in that category, because the judgment of the court is generally seen as overcoming any damage caused by the institution of the proceedings and the allegations therein. That is not true of bankruptcy proceedings, which may have an immediate impact in the business world, well beyond the proceedings themselves. It is also not true of courts-martials or criminal proceedings and proceedings to strike off a legal practitioner (see *Little*, supra).

The position in Hong Kong

[148] The Hong Kong courts has not conclusively put their stand as to whether the claim of malicious prosecution applies in civil proceedings (refer to *Sum Cheung Wai v Tsui Hin Yuet* [2016] 6 HKC 494; *Lee See Woo v Chu Hong Pong* [2020] HKCU 3519). Although the Hong Kong Court of first instance held in *Lee See Woo* that it was arguable that the law recognised the tort of malicious prosecution should extend to civil proceedings for purposes of determination of the striking out in that case, the court still cautioned against regarding this as a definitive ruling on whether Hong Kong Law should be so extended.

The position in Malaysia

[149] In criminal proceedings, the position is clear, namely where the criminal process has been abused when a person has been wrongly charged in court, under certain conditions, the person will have a remedy for malicious prosecution.

[150] In *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259, Mahadev Shankar J (as he then was) doubted the existence of a tort of malicious prosecution of civil proceedings.

[151] The Court of Appeal in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ

340, appears to have implicitly accepted that Malaysian law did not recognise a tort of malicious prosecution of civil proceedings.

[152] To date, there is no Federal Court decision on the matter.

[153] Going by the guidelines given by the Supreme Court in *Willers*, there is no definitive guidance from the case laws as to what must be proven to succeed in a claim for civil malicious prosecution, especially in proving malice. The Supreme Court there relied on previous precedent which relates to criminal malicious prosecution claims.

[154] *Lee Tat Development* and the dissenting judgments in *Crawford* and *Willers* advocate for a very cautious approach in extending it to civil claims. Reason being it would undermine the principle of finality of litigation and legal process as this would encourage satellite litigation as seen in *Lee Tat Development*, where parties were disputing not the original subject matter of dispute but the conduct of the dispute itself. In the process it opens floodgates of unnecessary litigation and taking up precious court's time and resources.

[155] Given the aforesaid, we are of the view that so long as a person has the right in law to commence legal proceedings against another, regardless of the motive in doing so, he would not be civilly liable even if those proceedings turns out to be unmeritorious. In the context of tort law, the principle is that malice is generally irrelevant. Hence to extend the tort to civil proceedings would be inconsistent with this principle. It is also our view that the extension of the claim of malicious prosecution to civil proceedings is still an area which is largely unsettled across the commonwealth jurisdiction. Jurisdictions such as UK, Australia, Hong Kong and Singapore have divergent approaches in extending the tort to civil proceedings.

[156] Bowen LJ in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, which is pre-*Crawford* and pre *Willers*, expressed his view on the issue as follows:

> In no civil action (even for fraud, where the fraud is charged on the face of the pleading) does bringing an action necessarily produce damage to character. If there is a trial the fame of the person sort of damage charged with fraud is cleared, if he deserves to have it cleared; and if there is no trial it is not assailed. Then as to damage to the person, it is clear that bringing a civil action does not in any way involve damage to the person. The same observation applies to the third sort of damage, for bringing a civil action does not necessarily damage property, for the only costs recognised by the law for this purpose are those which are properly incurred as between party and party, and they can be recovered from the plaintiff in the action which is improperly brought. *I am therefore of opinion that the broad canon which the Master of the Rolls has laid down is true, namely, that bringing a civil action, however*

unfoundedly, however maliciously, and with whatever absence of reasonable and probable cause, will not give a cause of action to the person against whom such action is improperly brought. (Emphasis added.)

[157] Given the aforesaid, we opined that the more preferred approach would be the principles as enunciated by the Singapore Court of Appeal in *Lee Tat Development* and the minority view of the Privy Council case and the UK case of *Adjusters Crawford* and *Willers* is the approach to be adopted in terms of the Malaysian jurisprudence.

[158] We have considered the cases referred to by the plaintiff in support of malicious prosecution in civil proceedings, however, those cases do not support or advocates for the tort of malicious prosecution to be applicable to civil proceedings.

[159] The plaintiff in the present appeal had obtained a judgment in his favour in Suit 1333 (the first suit) and he had also received the full judgment with interest and costs. There is no mischief to be remedied.

[160] Malicious prosecution as pleaded herein ought not be a recognised cause of action in civil proceedings and therefore was rightly struck out by the High Court.

[161] The answer to the revised question 3 is in the positive.

Question 4

[162] The judicial policy that denies a tort for perjury in the course of civil proceedings dates as far back as 1596 in the case of *Damport v Sympson* (1595) 78 ER 769. The plaintiff in *Damport* sued the defendant alleging that the defendant committed perjury in an earlier suit for conversion. The plaintiff sought to recover damages against the defendant in a second suit. As a result of the perjury in the first suit, the plaintiff obtained a reduced amount of damages in the sum of two hundred pounds instead actual value of five hundred pounds. The action for tort of perjury was denied was due to such perjury can be punished by statute and if a civil action was allowed it would double the punishment which would not be reasonable.

[163] Lord Denning MR in *Roy v Prior* [1970] 1 QB 283 at p 287 rationalised why an action for damages for such tort should not lie because 'witnesses must be able to give their evidence without fear or consequences. They might be deterred from doing so if they were at risk of being sued for what they said'.

[164] The seriousness of bringing tort of perjury in civil proceedings was expressed by Lord Wilberforce at p 480 of *Damport* that there is a need 'to avoid multiplicity of actions in which the value of the truth of the evidence would be tried over and over again'.

[165] Lord Goddard CJ in *Hargreaves v Bretherton and another* [1959] 1 QB 45 expressed his concern that half the prisoners in England bringing actions against prosecution witnesses, and this is a very real problem in relation to the extension of a civil action for perjury to perjury alleged to have been committed in the course of a criminal trial.

[166] The High Court of Australia in *Cabassi v Ferrando* (1940) 64 CLR 130 which followed suit when it held in relation to an alleged perjury in civil proceedings, that a witness, against whom it is alleged that his evidence amounted to perjury, cannot be made liable by framing the claim as one for conspiracy with others to defraud the plaintiff by giving of false evidence. It was made clear in paras [148]–[151] in *Cabassi* that the policy was that 'subsequent action for fabrication of evidence or perjury was to be dealt in the areas of criminal law and that all conduct of witnesses was covered by immunity'.

[167] On the alleged tort of fraud based on perjury, Malaysia does not recognise a general tort of fraud based on alleged perjury in the first suit as suggested by the plaintiff. The alleged existence of such tort would run contrary to the principle of the doctrine of witness immunity.

[168] The appropriate remedy for perjury is within the realm of criminal law which requires perjury to be proven beyond reasonable doubt. In introducing a new tort of perjury would tantamount to circumventing the rigorous threshold of burden of proof and ignoring the underlying rationale to avoid the 'chilling effect' on potential witnesses. D1 and the other defendants are already facing charges for alleged perjury in the criminal court pursuant to the police report lodged by the plaintiff, four months after the decision of the High Court in the present appeals.

CONCLUSION

[169] In summary the answers to the questions of law posed are as follows:

(a) question (i) — positive;

(b) question (ii) — negative;

(c) question (iii) — positive; and

(d) question (iv) —negative.

[170] Given the aforesaid, we find that the Court of Appeal had erred in facts and law. We therefore:

(a) allowed the appeals by the defendants/appellants with costs of RM150,000 to D1. Costs of RM100,000 to each set of the other defendants/appellants. Costs to be paid to the defendants/appellants subject to allocator;

(b) order that the Court of Appeal order of RM60,000 for each defendant/appellant and allocator fees of RM2,400 be refunded to the defendants/appellants;

(c) order that the Court of Appeal order dated 20 May 2024 be set aside and the High Court's order dated 14 June 2022 be restored; and

(d) order that the amended statement of writ of summons dated 13 July 2021 and statement of claim dated 13 July 2021 against the defendants/appellants be struck out.

Rhodzariah Bujang JCA (delivering dissenting judgment of the court):

INTRODUCTION

[171] At the risk of being repetitive with the background facts stated in the judgment of the majority, I wish to reiterate the following pertinent facts in these appeals. The filing of the respondent's claim in the High Court against the appellants in these four appeals and another defendant (Yee Teck Fah), not a party in these appeals nor in the Court of Appeal, was almost 14 years after that of an earlier suit he filed on 19 November 2007 in High Court Suit No S5-22–1333 of 2007 ('Suit 1333') against the appellant in Appeal No 02(i)-39–10 of 2024(W) now before us, ie, Kamal YP Tan ('Kamal') for breach of Kamal's promise to pay him monies owing to him under an acknowledgement of debt signed by Kamal for the transfer of shares in a Thailand based company called Euroceramic Technologies Co Ltd ('ECT') in the sum of RM8,018,225. The High Court in Suit 1333 dismissed the respondent's claim on 11 August 2016 and allowed Kamal's counter claim of RM3,583,211.42 for an alleged personal loan given to the respondent. The High Court decision was set aside on 10 January 2019 by the Court of Appeal on appeal by the respondent herein and Kamal's application for leave to appeal to this court, as well as his application for a review of the said decision, were dismissed by this court on 18 July 2019 and 23 November 2020, respectively. Kamal had thereafter paid the respondent the judgment sum in full together with the interest at 5%pa from the date of the filing of the claim till its realisation as well as the RM100,000 costs ordered by the courts.

[172] In spite of the legal victory, the respondent decided to file a suit in Kuala Lumpur High Court, ie, Suit No WA-22NCVC-460–06 of 2021 ('Suit

460') on the 30 June 2021, which is the subject matter of these appeals before us, against the witnesses in Suit 1333, ie, Kamal (first defendant), Ng Wai Pin (second defendant), Michael Benedict (third defendant), Wong Yoke Yen (fourth defendant), Wong Fook Lin (fifth defendant) and Yee Teck Fah (sixth defendant) who was Kamal's lawyer in Suit 1333 but who is not a party in these appeals before us as I had stated earlier. This Suit 460 of the respondent is a tortious claim against them, premised on an alleged fraud and forgery, conspiracy by them to fabricate evidence against him and for tort of abuse of process, all in Suit 1333 when they falsely claimed that Kamal had given personal loans to the respondent for RM3,584,211.42. Kamal was also sued for malicious prosecution for filing his counterclaim in Suit 1333 because he did so maliciously 'with the sole purpose to convolute, dilute, delay, intimidate and oppress' the respondent from proceeding with his main claim in Suit 1333 (see paras 69 and 70 of the statement of claim in Suit 460). Except for Yee Teck Fah, all the appellants before us have filed a striking out application against the respondent which the High Court allowed but which decision was reversed by the Court of Appeal pursuant to separate notices of appeal filed by the respondent against the appellants herein. Aggrieved by the said decision, the appellants herein filed separate applications for leave to appeal to this Court.

THE QUESTIONS OF LAW

[173] This court granted leave for the appellants to appeal on 24 September 2024 on the following questions of law:

(a) whether the common law principle of immunity of a party and witness from liability in a civil action, subsequent or otherwise, in respect of evidence, oral and/or written, given in judicial proceedings is absolute?

(b) whether it is permissible for a party who had been vindicated and/or was successful in a first action to mount a second action against the same opposing party in the first action based upon the conduct and/or evidence of the said opposing party?

(c) whether the tort of malicious civil prosecution is only actionable and/or confined to the specific instances set out at para 67 of the Privy Council decision of *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17? and

(d) whether a contended cause of action premised upon the tort of fraud based on perjury is a recognised and/or actionable claim in Malaysia?'

[174] It is to be noted that question 3 above was revised, with leave of the court, on 11 December 2024 and it reads as follows:

> Whether the minority views as expressed in *Crawford* and *Willers* respectively and the decision of *Lee Tat Development* on the existence and availability of the tort of

malicious prosecution to civil proceedings are to be adopted in Malaysia? A

[175] Before delving into the merits of these four questions of law, I would briefly mention the basis of the High Court and Court of Appeal decisions herein. B

THE HIGH COURT DECISION

[176] The learned judicial commissioner ('JC') (as His Lordship then was), struck out the respondent's claim against the appellants herein based on res judicata and abuse of court process because the facts relied on by the plaintiff for the alleged fraudulent evidence, perjury, false affidavits and/or submissions filed by Yee Teck Fah were all available in Suit 1333 and that defence is available not just to Kamal but to the other defendants who were not parties in Suit 1333. His Lordship held that given the clear substantial duplication of issues and reliefs sought in this suit and Suit 1333, the filing of the former suit is an abuse of process and the plaintiff should not be allowed to have a second bite of the cherry. Given that the allegation of perjury and fraudulent evidence by the appellants were all available during Suit 1333, the alleged false affidavits and legal submissions filed by Kamal with the alleged assistance of the other appellants, the respondent's claim is barred by res judicata. C D E

[177] In addition, the learned JC held that the appellants herein are entitled to rely on the defence of witness immunity as the exception to the rule of immunity does not apply to the pleaded case against them and also for the claim based on the alleged perjury as that is not recognised under Malaysian law. The claim based on malicious prosecution was struck out because that is only available in a company winding up and bankruptcy proceedings. F

[178] However, the learned JC decided that the claim based on tort of conspiracy is a viable claim based on the pleaded facts which justifies the elements for the said tort. His Lordship also decided that the respondent's claim for damages should be struck out as he had been paid the judgment sum in Suit 1333 with interest and he should have raised the damage he suffered for the late payment which are, inter alia, the loss of mining ventures and bankruptcy proceedings filed against him in those related proceedings. G H

THE COURT OF APPEAL DECISION

[179] The reversal of the High Court's decision by the Court of Appeal was primarily because the respondent's claim herein was based on a conspiracy to fabricate false evidence to defraud him in Suit 1333 which must be given a thorough examination at the trial and which allegation could not be raised in the said proceeding because the respondent only discovered these facts after the I

close of proceedings in that Suit 1333. Therefore, res judicata or estoppel do not apply. As for his claim for malicious prosecution based on alleged abuse of process by the appellants herein by the giving of false evidence and intimidation of witnesses in Suit 1333, it is available not just in winding up and bankruptcy proceedings. As for witness immunity, the Court of Appeal agreed with the respondent that witness immunity should not apply to acts of procuring false evidence and an exception to that rule, recognised in jurisdiction like the United Kingdom, applies in Malaysia. Given the complexity of the claim and the serious legal questions raised in the present suit, the Court of Appeal held that this is not a plain and obvious case for striking out.

MY DECISION

[180] Having considered the above-mentioned judgments, the evidence in the appeal record and submissions of all learned counsel for the parties in these four appeals, I am of the view that these appeals should be dismissed and the decision of the Court of Appeal be and is affirmed premised on the following considerations.

[181] First and foremost, these appeals involve striking out applications filed by all the appellants herein under O 18 r 19(1) of the Rules of Court 2012 ('the ROC 2012') and the law on this is trite and very much settled, which is, it is only in a plain and obvious case that the court would resort to the summary procedure of denying a plaintiff or a defendant (as the case may be) the chance or opportunity of ventilating their claim or defence in court in a full trial. The application of this principle can be seen in the legendary decisions of the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 which has been consistently applied by our courts at all levels until now. In this regard, I would like to highlight the decision of this court in *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1 where the High Court's decision to strike out the claim was reversed because, as held by this court, the appellant's claim is not an obviously unsustainable one and the fairly recent one also by this court ie, *Kerajaan Malaysia v LFL Sdn Bhd and another appeal* [2019] 12 MLJ 1; [2025] 1 CLJ 851 where in para 47 it is held as follows:

> [47] The domestic law relating to striking out is trite (see: *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 and *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1). In these cases, the subject matter of the applications usually relates to the need for the parties to ventilate evidence in full before arriving at a final decision, as a consequence of which the option of striking out becomes untenable. In other words, these applications are related to the requirement for further evidence at trial.

WITNESS IMMUNITY

[182] It is to be emphasised that the core premise of the respondent's case against the appellants and Yee Teck Fah is that they had conspired to fabricate and give false evidence against him in Suit 1333 and his pleaded allegation against them includes the intimidation and coercion of witnesses, the use of, inter alia, fabricated and/or forged documents, including the affidavits and a conspiracy to injure him, which facts were only discovered by him during and after the trial, which therefore renders it impossible for him to raise this claim against them in Suit 1333. It is to be noted, in this respect, as highlighted by the respondent in his written submission, that three of the witnesses at the trial who gave evidence against the respondent in Suit 1333 had after the trial had concluded, filed police reports against, amongst others, Kamal and Yee Teck Fah for allegedly duping, coercing and manipulating them in respect of the false and fabricated documents. The three named witnesses are Kong Ah Choo, Edward Moses Julius Joseph (deceased) and Law Swee Haw. Clearly, in my view, the veracity of these really serious allegations against the appellants and Yee Teck Fah too, cannot be summarily determined without a full trial where the credibility of the allegations made against these litigants and witnesses would be effectively tested through cross-examination with the audio-visual advantage enjoyed by the trial judge.

[183] It is to be equally emphasised that the respondent had lodged police reports against the appellants herein and had been charged in court under s 193 of the Penal Code for perjury, thus supporting the respondent's contention that his claim against them is not obviously unsustainable. The clear irrefutable evidence of this is not just the charge sheets but more importantly too, the official letter dated 23 April 2024 to the respondent from the investigation officer, Insp Muhammad Farid bin Fadzillah, confirming that the appellants now before us have been so charged in the Magistrate Court, Kuala Lumpur. The said letter is reproduced in encl 31, ie, the appeal record Vol 4(24) at PDF pp 192–193. This fact to me amplifies my decision that the respondent's claim against the appellants herein and Yee Teck Fah is not an obviously unsustainable which does not merit a full trial but is one which has to be determined at such a trial based on *viva voce* and documentary evidence tendered therein.

[184] I make the above finding in full awareness of the principle of witness immunity which is based on public policy and the rationale behind it which is not to vex witnesses with defending action against them and to avoid multiplicity of action in a retrial on the veracity or truth of their evidence, so finality of court proceedings or litigation is the consideration. I refer to the House of Lord's decision in *Darker and others v Chief Constable of the West Midlands Police* [2001] 1 AC 435; [2000] 3 WLR 747; [2000] UKHL 44

where the said principle of witness immunity, relevant to our case is explained as follows by the House of Lords:

> The underlying rationale for the immunity given to a witness is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court. This immunity has been extended, as I have described, to proofs of evidence and to prevent witnesses being sued for conspiracy to give false evidence. *But the immunity in essence relates to the giving of evidence. There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect.* In practice the distinction may appear to be a fine one, as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made. *But I consider that the distinction is a real one and that the first example comes within the proper ambit of the immunity and the other does not.* (Emphasis added.)

[185] I am also in agreement with Lord Cooke who quoted, at p 453 of the report, the case of *Silcott v Commissioner of Police for the Metropolis* [1996] 8 Admin LR 637 ie that:

> Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* (1974) 1 NZLR 180, 197, *'The protection should not be given any wider application that is absolutely necessary in the interest of the administration of justice ...'.* Many other authorities contain language to similar effect.

[186] Learned counsel for the respondent had rightly submitted, and I quote from para 43 of the his written submission, that the respondent's 'cause of action is not against the contents of the false evidence given by the appellant but their conduct or actions in that they have collaborated and conspired and acted to fabricate or create false evidence to support a fabricated fact alleged by Kamal in Suit 1333', and the giving of the said evidence was in order to obstruct and/or to injure the respondent. In other words, his claim against them is against their conduct or acts and not just the false evidence itself. That to me is a fine distinction which dispels any argument that the ratio in *Darker*'s case is not applicable just because the initial and original case in *Darker*'s case was a criminal one and the fabrication of evidence was by the law enforcement officers, ie, the police which facts are encapsulated in the earlier quotation of the passage from *Darker*'s case which I had reproduced above. The above distinction as made in *Darker*'s case shows that there should not, as

submitted by the respondent, a blanket application of the witness immunity rule because doing so would deny access to the courts to remedy a serious wrong. In this regard as well, I am of the view that the fact that the respondent had been fully vindicated in Suit 1333 by the ultimate full satisfaction of the judgment sum he obtained in the said Suit cannot be, by itself, a prohibition against the filing of this action against the appellants and Yee Teck Fah but is a consideration in determining the quantum of damages, if the respondent wins in his suit against them and successfully proved that there was indeed such an engineering or fabrication of evidence and conspiracy to defraud by the appellants and Yee Teck Fah against him. Thus, on the facts of this case, I am of the view that the respondent's claim against the appellants and Yee Teck Fah based on their alleged fraudulent acts and perjury is not an obviously unsustainable one which does not merit a full trial. I am also fortified in making this conclusion of mine by the decision of the Canadian Court of Appeal in *Reynolds v Kingston (City) Police Services Board* 84 OR (3d) 738 which is consonant with the said view of mine that the application of witness immunity is a question of fact to be determined at the trial and not one which merits a striking out of a claim which is that of negligent investigation and misfeasance in public office brought by the plaintiff in the case cited. Therefore, question 1, question 2 and question 4 are answered in positive.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS

[187] Next, in respect of the respondent's claim specifically against Kamal for the tort of malicious prosecution which is the substance of question 3. I wish to note that the Privy Council case of *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another* [2013] UKPC 17 mentioned in the original question 3 is the majority decision which overturned the very much earlier decision in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, which held that the said tort is not available even though the civil action was brought maliciously and without reasonable and probable cause. *Crawford*'s case held that the tort of malicious prosecution is available generally to civil proceedings which decision is affirmed by the majority of five judges (with four judges dissenting) of the Supreme Court of England in *Willers v Joyce and another* [2016] 3 WLR 477; [2016] UKSC 43. However, the Court of Appeal of Singapore in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50 shared the same view with the minority judges in both *Crawford*'s case and *Willer*'s case by deciding that the said tort does not extend to civil proceeding generally except in the special cases as listed in para 67 of *Crawford*'s case. For ease of reference, the said para 67 is reproduced below:

> 67. The result of the effective prohibition by the comments in the *Quartz Hill* case of any general development in England and Wales of a tort of malicious prosecution of civil proceedings has been to confine the tort to a few disparate situations, linked

only by the occurrence of prejudice to the victim at or close to the outset of the proceedings. They include:

(a) a petition for bankruptcy: *Johnson v Emerson* (1871) LR 6 Ex 329;

(b) a petition for winding up: The *Quartz Hill* case itself;

(c) a writ to arrest and detain a judgment debtor who had in effect already paid the debt: *Gilding v Eyre* (1861) 10 CB (NS) 592, 142 ER 584;

(d) the procurement of a bench warrant to arrest and produce a person for failure to respond to a witness summons which had not been served on him: *Roy v Prior* (1971) AC 470;

(e) a writ to arrest a ship in the course of a dispute about a contract for its sale: *The Walter D Wallet (1893) P 202*;

(f) a writ to arrest an aircraft in the course of a dispute about an alleged lease of it: *Transpac Express Ltd v Malaysian Airlines* (2005) 3 NZLR 709;

(g) an order for the attachment of the claimant's assets in advance of an arbitration: *The Nicholas M* (2008) EWHC 1615 (Comm); (2009) 1 All ER (Comm) 479; and

(h) a search warrant: *Gibbs v Rea* [1998] AC 786.

[188] Without a need for further elaboration, I wish to state that the listing of these civil actions in para 67 was merely to state the law after *Quartz Hill*'s case and Lord Wilson made further deliberation and states his view at para 68 that there is a need for reversion to the old principled law which made no distinction between malicious prosecution of criminal and civil proceedings. Then, at para 73, His Lordship concluded as follows:

> 73. In the end I conclude that the arguments against renewed recognition of a tort of malicious prosecution of civil proceedings fail to override the need for the law to be true to the reason for its very existence. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 Sir Thomas Bingham MR referred, at p 663, to 'the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied'. The word in the rule is 'wrongs' as opposed to 'misfortunes': see *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15 [2004] 1 WLR 1057, at para 2 (Lord Steyn). In J*ones v Kaney* [2011] UKSC 13; [2011] 2 AC 398, Lord Dyson said, at para 113:
>
> > The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional ... any justification must be necessary and requires [to be] strict and cogent ...
>
> The cumulative force of the suggested justification for denying Mr Paterson a remedy for what can only be described as the wrong done to him by Sagicor fails in my view to measure up to these demanding standards. In determining his claim of malicious prosecution, the Board should be true to its primary loyalty.

[189] Learned counsel for the respondent had also cited a Hong Kong's case, ie, *Chua, Grace Gonzales v Sobrevilla, Rhennie Boy Fernandez* [2017] HKCU 2145 which considered *Crawford Adjuster*'s case and noted that 'malicious proceeding is recognised as a viable tort at common law' and to a decision of its own court in *Yanfull Investments Ltd v Datuk Ooi Kee Liang* [2017] 5 HKC 42 where the judge refused a striking out application filed because the judge was not convinced that the claim for malicious proceedings before him was so devoid of merit that he can strike it out and that decision was affirmed by the Court of Appeal of Hong Kong. Therefore, the court in the *Chua, Grace Gonzales*'s case also declined to strike out the claim simply on the ground that the tort itself is not recognised at law. In this regard, it is to be noted that the tort of malicious prosecution in civil proceedings is also available in New Zealand as mentioned in *Burgess v Beaven* [2020] NZHC 497. I am equally convinced, after consideration of the above-mentioned authorities that the tort of malicious prosecution applies in Malaysia as in these other jurisdictions, and not limited to just the civil actions listed in para 67 of *Crawfords Adjuster*'s case, because in my view, the existence of the said cause of action can be a form of deterrent against unscrupulous litigants who are motivated by malice, bad faith or unlawful extraneous consideration to file a claim against another for, as held in *Chua, Grace Gonzales*'s case the wrong that is at the heart of the tort of malicious prosecution is the manipulation of the legal system. In any case, as I had said earlier, in the event the claim for malicious prosecution fails after evidence at full trial of the case disclose that it is unsustainable or was raised without any valid legal justification, the plaintiff can always be punished by the court's order on cost which in itself should be a form of deterrent to the filing of such a claim by unscrupulous litigants.

[190] In the upshot and premised on the above considerations, I found no appealable error in the judgment of the Court of Appeal that remitted the cases for full trial, which merits my appellate intervention. Hence, I would answer question 1, question 2 and 4 in the positive, as i had indicated earlier and the revised question 3 in the negative. Accordingly, on these notes, the four appeals should be dismissed with costs.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh